

AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT: HEALTH CARE INSTITUTIONS

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I. INTRODUCTION

The National Labor Relations Act has governed the labor relations of millions of workers since its enactment in 1935. In its original form it was deemed to be applicable to private non-profit hospitals, but the Taft-Hartley Amendments of 1947 specifically exempted employees of private non-profit hospitals from the Act's purview. Distressed by the frequency and consequences of recognition strikes in the health care industry, Congress recently undertook to balance the interests and rights of employers, employees, and the public in order to provide stability and regularity to employment in the health care industry. The result was a set of amendments to the National Labor Relations Act which were designed to establish and facilitate collective bargaining, reduce the opportunity for negotiation impasses, and, most important, recognize and protect the public interest in the continuity of health care.

On July 26, 1974, President Nixon signed the new amendments into law. Ironically, on that same day the California Nurses' Association reached a tentative agreement on a contract with three hospital associations (which had affected forty-two Northern California hospitals and clinics), thus ending a three-week strike in California. The fear of just such life-endangering strikes was an obvious argument against the legislation designed to sanction collective bargaining in hospitals. However, the provisions of the approved bill, making bargaining the subject of a full panoply of unique provisions, could possibly have avoided the much-publicized strike in California. In this regard, many people feel that the bill, and certainly its legislative impetus, is prophylactic in nature and that it is designed to control and confine economic labor activity in the health care situation, rather than being a concession or favor to organized labor. As such, the legislation appears to be a perhaps uncomfortable merger of the dual postulates of employee rights and public protection.

It is evident from a review of the form and content of the new legislation that Congress recognized that the public interest in health care, whether served by proprietary or non-profit institutions, re-

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quired special consideration in the Act. The uniqueness of the health care industry led Congress to add special provisions to the Act which were designed to accomodate the special need of the health care industry to provide continuous patient care. The portions of the Act so tailored include the enactment of notice requirements to an employer and federal and state conciliatory agencies, mandatory participation in mediation efforts, and advance notice requirements prior to strike or picketing activity. Senator Taft expressed the view that:

This legislation clearly reflects the Congressional recognition that health care is significantly different enough from other aspects of the economy to merit special protections and procedures under the act.¹

The health care field is a distinct industry due to the nature of the employers involved, the nature of the services rendered, and the nature of the labor relations encountered. Health care institutions are sparsely concentrated throughout the country, and many serve an expansive area, both in terms of number of patients and distance from similar alternative services. In prior years, when only segments of the industry were within the purview of the Act, the effects of a crippling labor dispute at one of the covered institutions were mitigated by the existence of alternative sources of health care available at non-profit and governmental institutions (which composed the majority of the total number of health care institutions). The obvious concern, therefore, is that assertion of jurisdiction over all such entities will exacerbate the implications of labor disputes at health care institutions. Moreover, the nature of the newly-covered employer is such that in many instances no viable alternatives for the affected services exist to replace those lost to labor disputes. The lack of appropriate alternatives stems from the fact that (a) many health service employers are located in predominately rural areas where a single institution, often small, provides health services for a large geographical area, and (b) many health service employers are engaged in providing specialized services to patients or other institutions, for which no readily available replacements exist.²

Another unique aspect of the health care industry involves the nature of the services rendered by the employers. The only commodity marketed by health care institutions is a personal service, which often requires speedy administration and is directly concerned with

¹ 120 CONG. REC. 7311 (daily ed. May 7, 1974).

² Such specialized services include psychiatric clinics, asthmatic services, chest disease centers, tuberculosis sanitariums, rehabilitation centers and assorted other varieties of institutions dedicated to the treatment of particularized disorders.

the health, indeed sometimes the life or death, of its patrons. The essential concern for the welfare of patients is a variable not encountered in more traditional labor disputes. In this regard, Senator Dominick commented:

Hospital care is not storable. It is essentially an immediate service to the sick and injured. There is no stockpile from which to draw, no storage yard, or warehouse backup potential as that found in many business fields. If the health care nurse, radiologic technician, laboratory technologist, electroencephalographic technician, physical therapist, surgical nurse, critical care nurse specialist, and many other numerous health care specialists are not at or near the bedside or responsive on call to the need of patients, the hospital ceases to function and the public interest is immediately downgraded and its welfare endangered.³

A third distinguishing feature of the health care industry is the inapplicability of various traditional labor relations concepts. Not all of the normal legal fictions imposed on the power relationships inherent in labor-management confrontation are readily transferred to the health care situation. The involvement of the public tends to blur the traditional line between management and labor; economic pressures brought to bear on health care institutions affect the public perhaps more critically than the employer. It is the availability of health services, and not necessarily employer profits, that is compromised. As such, the struggle between labor and management may be illusory if the employer is placed in a position where he has no real power to say "no" to union demands. The right to strike is seen generally by unions as the "ultimate" weapon in the labor-management struggle. The denial of this right to health care employees is deemed appropriate by some, due to the fact that a health care institution cannot respond with the "ultimate" weapon available to private sector employers—closing the business down. This consideration would suggest that settlement of labor disputes in the health care industry is basically not an economic or market-oriented process and that reliance on the economic power concept as the catalyst and goad to resolution of labor disputes may be misplaced.

The regulation of labor relations in health care institutions involves a policy decision; its resolution depends on whether the question is seen in terms of labor-management relationships or in terms of the insured availability of public health care. Congress has attempted to strike a balance between the rights of employees to bar-

³ S. REP. NO. 93-766, 93d Cong., 2d Sess. 39 (1974) (individual views of Sen. Dominick).

gain and the right of the public to receive uninterrupted health care. The special status accorded to health care institutions in the amendments demands equally special and considered treatment by the Board and the courts.

A. *Historical Bankground*

To provide perspective for an analysis of the new legislation it is instructive to recount briefly the evolutionary history of the National Labor Relations Act as it has applied to private non-profit hospitals. In the Preamble of the National Labor Relations Act, Congress noted that the denial of the right of employees to organize and the refusal to accept the procedure of collective bargaining had led to strikes and other forms of industrial strife and unrest.⁴

By recognizing that strikes directly and immediately burden or obstruct interstate commerce, Congress was able to assert its tentacle-like legislative power in the labor area. The National Labor Relations Board has relied upon this rationale in establishing as a test of its own jurisdiction the immediacy and directness of the effect upon interstate commerce of the activity in question.⁵ Thus, a subtle legal framework has been constructed which permits the Board to balance various factors in deciding whether to exercise jurisdiction over non-profit entities.

In 1944 the National Labor Relations Board asserted its jurisdiction in a dispute between a charitable hospital and the representa-

⁴ National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970), hereinafter referred to in text as the Act.

⁵ The evolution of this test can be traced through a series of developmental stages. In the *Trustees of Columbia University*, 97 N.L.R.B. 424, 29 L.R.R.M. 1098 (1951), the Board confronted the question of jurisdiction over non-profit educational institutions.

It observed that the conference Report on the Labor Management Relations Act of 1947 had stated:

The . . . nonprofit organizations excluded under the subject to NLRB specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.

In *Cornell University*, 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970), the Board relied on the Supreme Court's pronouncement in *Office Employees International Union, Local No. 11 v. NLRB*, 353 U.S. 313, 318 (1957) that ". . . the Board has never recognized such a blanket rule of exclusion over all non-profit employers. It has declined jurisdiction on an *ad hoc* basis over religious, educational, and eleemosynary employers . . ." The Board ruled that educational institutions "as a class have not only a substantial, but massive impact on interstate commerce," and subsequently jurisdiction was extended by Board rule-making to reach all non-profit educational institutions. As a result of *Cornell University*, the impact on commerce of the subject class of employers became the touchstone for the jurisdictional inquiry.

tives of its employees in the case of *NLRB v. Central Dispensary & Emergency Hospital*. The court of appeals determined that the activities of the hospital were "trade and commerce" within the meaning of the National Labor Relations Act, and the fact that they were carried on by a charitable hospital was deemed immaterial. In holding that a charitable hospital is not exempt from the National Labor Relations Act, the court adopted the point of view of the employees: "We cannot understand what considerations of public policy deprive hospital employees of the privilege granted to employees of other institutions."⁶ This enduring policy enunciation, with an appeal of logic that is practically oppressive in its simplicity and lucidity, was the progenitor of the recent amendment.

In 1947 Congress enacted the Taft-Hartley Amendments to the National Labor Relations Act. At this time, Congress apparently determined that there were public policy considerations that made it necessary to deprive employees of non-profit hospitals of the privileges granted to employees of other institutions. In a bit of legislative legerdemain, § 2(2) of the National Labor Relations Act was amended to define the term "employer" so as not to include "any corporation or association operating a hospital, if no part of a net earnings inures to the benefit of any private shareholder or individual."⁷ Unfortunately, the legislative history of this "exemption" fails to indicate the policy considerations that support it and the intent of Congress in enacting it.⁸

Due to the exemption in the National Labor Relations Act and the absence of effective state legislation, employees of non-profit hospitals have been denied the statutory right of collective bargaining, and hospitals have been denied the protection of the provisions of the National Labor Relations Act that are designed to ensure quick and amicable resolution of disputes, with minimal interference with the operation of the facility. The experience under the exemption was that withholding the Board's jurisdiction did not reduce the num-

⁶ *NLRB v. Central Dispensary & Emergency Hospital*, 145 F.2d 852, 853 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847 (1945). This particular reasoning was echoed in *Council 19, American Federation of State, County and Municipal Employees, AFL-CIO v. NLRB*, 296 F. Supp. 1100 (N.D. Ill. 1968).

⁷ 29 U.S.C. § 152(2) (1970).

In spite of a lack of clarity of the legislative history regarding the exemption of charitable hospitals from National Labor Relations Board jurisdiction, the Draconian aftermath of the exemption was clear. Such was exemplified in the decision in *Utah Labor Relations Board v. Utah Valley Hospital*, 120 Utah 463, 235 P.2d 520 (1951). In that case the court indicated that in the absence of preemption of the field by Congress, state law controlled labor-management relations.

⁸ H. R. REP. NO. 1051, 93d Cong., 2d Sess. 3 (1974).

ber of strikes or labor unrest. To the contrary, with the rapid development of the non-profit hospital industry, experience has shown an increasing number of recognitional strikes.⁹

In response to this unsatisfactory state of affairs, the National Labor Relations Board began asserting jurisdiction over areas it had formerly ignored. It created the term "extended care facility" and determined that such a facility was an "employer" subject to the jurisdiction of the Board.¹⁰ Narrowing the "exemption" could not satisfactorily resolve the anomalies created by the lack of regulation of the activities of non-profit hospitals, as the Board acted slowly and cautiously.¹¹ Instead, the confusion in this area called for the surgical elimination of the exemption from the statute.

B. *Impetus for Legislative Action*

Congress approached the exclusion granted to non-profit hospitals with the view that major disruptions in the medical industry had resulted from strikes for recognition, made necessary by the fact that an employer had no statutory duty to recognize a union representing a majority of its employees in an appropriate unit.¹² By legislating that employees in health care institutions would be covered by the Act, it was contemplated that the incidence of strikes in the industry would be greatly reduced. The amendment was described as having the dual objectives of reducing recognitional strikes and lessening employee turnover in health care institutions.¹³ As a consequence of

⁹ H.R. REP. NO. 1051, 93d Cong., 2d Sess. 4 (1974).

¹⁰ *NLRB v. Evangelical Lutheran Good Samaritan Society*, 477 F.2d 297 (9th Cir. 1973). The Board accepted the American Hospital Association definition of "extended care facility," which is:

An establishment with permanent facilities that include inpatient beds; and with medical services, including continuous nursing services, to provide treatment to patients who require inpatient care but do not require hospital services.

Drexel Home, Inc., 182 N.L.R.B. 1045, 1047, 74 L.R.R.M. 1232, 1235 (1970).

¹¹ *E.g.*, jurisdiction was extended to proprietary hospitals whose annual gross revenues exceeded \$250,000 in *Butte Medical Properties*, 168 N.L.R.B. 266, 66 L.R.R.M. 1259 (1967) and to profit-oriented nursing homes with an annual gross income of \$100,000 or more in *University Nursing Home, Inc.*, 168 N.L.R.B. 263, 66 L.R.R.M. 1263 (1967). Most recently, the Board extended its jurisdiction to cover non-profit nursing homes in *Drexel Homes, Inc.*, 182 N.L.R.B. 1045, 74 L.R.R.M. 1232 (1970), leaving only the non-profit hospital exempt under the statutory language.

¹² Representatives from the Service Employees International Union testified before the Senate Committee that recognition strikes accounted for approximately ninety-five percent of all strikes in non-profit hospitals, averaging thirty-two days in length, and resulting in an average of 3,967 idle man-days for each struck facility. 120 CONG. REV. 86932 (daily ed. May 2, 1974).

¹³ 120 CONG. REC. 4587 (daily ed. May 30, 1974) (remarks of Rep. Thompson). Representative Thompson cited the experience of Johns Hopkins Hospital in Baltimore, Maryland,

the new law, it was hoped that labor-management relations in such institutions would be focused on terms and conditions of employment, which were thought to be meaningful issues less associated with conflict than issues pertaining to union recognition.¹⁴

The prevailing Congressional view was that the public interest in continued and competent health care demands that employees of health care institutions be treated in the same way as employees in other industries. Moreover, disparate treatment for employees performing identical functions in proprietary institutions and non-profit nursing homes appeared illogical. Thus Congress disregarded the prior classification of non-profit hospitals as "local" in nature and having an insubstantial effect on commerce and focused instead on their similarity to proprietary hospitals, differentiating them only in their manner of distribution of revenues. After all, it is not an especially beguiling argument that the non-profit health care industry is "local" or that it does not affect commerce since its employees number over one and a half million, or fifty-six percent of all health care workers, and since non-profit hospitals realized a net total revenue of nearly nineteen billion dollars in 1972.

Congressional oration also evinced the hope that the quality of health care would improve as workers in the nation's health care institutions received wage increases. Testimony was presented that indicated that hospital wages had risen more slowly than the cost of hospital care in the five-year period prior to 1973. It was reported that in that time interval the wages of non-supervisory hospital employees increased 43.6%, while the Consumer Price Index of semi-private hospital rates increased at a rate of 66.8%.¹⁵ The Communication Workers of America estimated that the 1970 average annual income for all hospital employees, including doctors, nurses, and administrators, was only \$5,290.¹⁶

regarding the high rate of employee turnover, which prompted that hospital to recognize voluntarily a bargaining agent for its non-professional employees. The hospital had experienced a 1200% annual employee turnover rate which dropped to less than thirty percent after the union was recognized.

¹⁴ 120 CONG. REC. 6933 (daily ed. May 2, 1974) (testimony of N. Metzger, Vice-President for personnel, Mt. Sinai Medical Center, New York).

¹⁵ 120 CONG. REC. 6933 (daily ed. May 2, 1974) (testimony of J. Murphy, Representative of Service Employees' International Union). The wage issue may bring some difficult problems to the health care industry. Wages are depressed because the public and the institutions themselves have considered their activities as "quasi-charitable," many work forces are staffed by volunteers, and much of the labor in such institutions originates from the traditionally underpaid sectors of the work force (*i.e.*, women and minority groups). It does not appear that health care institutions will be able to reverse this condition instantly, even spurred by the goad of potentially crippling strikes.

¹⁶ These figures were supplemented by testimony that indicated that the average house

The most facile method of eliminating the inequities and inconsistencies created by the exemption would have been merely to excise the section granting immunity, so that health care institutions would enjoy the same status as all employers included within the purview of the Act. However, Congress chose not simply to delete the exemption. Rather, it made an effort to fashion comprehensive legislation that would accomodate the special public interest in continuous health service to patients. While existing law adequately regulates the interplay between management and labor generally, it was thought to be inadequate to provide the protection necessary for uninterrupted patient care. As a result, the enacted legislation seeks to establish a mechanism which will afford essential rights to employees of health care institutions while insuring that patient needs will not be sacrificed.

In framing the new legislation, Congress considered (a) identification of employers to be affected by the amendments, (b) strike and picketing activity at health care institutions, (c) procedural standards for bargaining with such employers, (d) accomodation of religious beliefs, and (e) appropriate bargaining units in the health care industry. The resulting legislation indicates that Congress clearly created for the health care institution a unique status in the scheme of the National Labor Relations Act.

II. AFFECTED EMPLOYERS

A. "Health Care Institutions"

The amendments define a "health care institution" as any:

. . . hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of the sick, infirm or aged person.

The definition thereby incorporates most obvious health-related employees as well as the newly-created "health maintenance organizations"¹⁷ and "extended care facilities," a term which has generated a particularized meaning throughout its once-important reign and tenure.

staff employee (interns, residents, or fellows) worked an average of between seventy and one hundred hours each week, earning a salary of approximately \$10,000 per year, which amounts to an hourly wage figure ranging between \$1.92 and \$2.74 per hour. 120 CONG. REC. S6933 (daily ed. May 2, 1974) (remarks of Sen. Cranston).

¹⁷ An HMO is an organization that contracts, for a fixed fee, to provide basic medical care to a body of participating members. It (1) provides "basic and supplemental health services to its members" as set forth in the Health Maintenance Organization Act, and (2) is organized and operated as the statute mandates.

The new definition not only makes no distinction between profit and non-profit organizations, but demonstrates a deliberate purpose to leap all potential ambiguities and voids which would halt less ambitious enactments. The legislative history of the amendment is replete with recognition of the peculiar nature and status of the health care industry. The inescapable conclusion is that Congress attempted to differentiate the health-care industry from other employers, thus portending accordingly distinctive treatment by the Board and the courts.

It should be noted that the existing exemption for "the United States or any wholly owned Government corporation or any Federal Reserve Bank, or any State or political subdivision thereof . . ." remains unaffected by the legislation.¹⁸ Consequently, health care institutions operated by municipal, state or federal governments will still not be deemed "employers" within the Act.

An obvious question raised by the new statutory language deals with the outer limits of the definition of a "health care institution." The relevant legislative history indicates that not all entities generally or remotely active in health-related fields are covered. The distinction is drawn between "patient-care situations" and those services which are "purely administrative health connected facilities."¹⁹ By way of example, the Congressional debates categorize insurance companies such as Blue Cross and Blue Shield as "administrative or financial organizations associated with health care institutions,"²⁰ and not

¹⁸ S. REP. NO. 766, 93d Cong., 2d Sess. 4 (1974); 120 CONG. REC. S7310 (daily ed. May 7, 1974) (remarks of Sen. Taft).

In Toledo District Nurse Association, 216 N.L.R.B. No. 130, 88 L.R.R.M. 1392 (1975), the Board dismissed the Union's representation petition after having determined that the Toledo District Nurse Association and the City of Toledo were joint employers of the work force the Union sought to represent. As a consequence, the Nurse Association shared the City's statutory exemption from the Act. The majority also indicated that even if the two concerns were not joint employers, the Board would exercise its discretionary power to decline jurisdiction due to the intimate relationship between the City and the Nurse Association. (Member Fanning, dissenting, would assert jurisdiction over the Association, regardless of its interaction with the City, if the Association had retained sufficient control over the employment conditions of its employees to enable it to bargain effectively with a union).

¹⁹ 120 CONG. REC. 7310 (daily ed. May 7, 1974) (remarks of Sen. Taft).

²⁰ 120 CONG. REC. 4594 (daily ed. May 30, 1974) (remarks of Rep. Dellenback). Due to the fact that Health Maintenance organizations, which are specifically included within the definition of a "health care institution," are designed to be an alternative to existing medical insurance plans, some question may arise as to the viability of the distinction raised in the legislative history, which exempts organizations merely "associated" with health care institutions.

However, it would appear that the distinction between medical insurance companies and Health Maintenance organizations is valid. The Health Maintenance organization is involved in a "patient-care situation," as distinguished from the third-party financial risk-bearing nature

within the scope of the new definition (but still within the general coverage of the Act), while the administrative departments of hospitals and other covered employers would not be exempted,²¹ due to their "direct or indirect connection with ongoing patient care." Accordingly, such other diverse peripheral services such as diet clinics, health centers, gymnasiums, etc., whose trade deals primarily with weight or body conditioning, as distinguished from "patient care functions," will not be included as "health care institutions."²²

Coverage depends on the perhaps illusory standard of "real patient care and health service delivery." Whether such service is provided in an outpatient or inpatient situation is not determinative. Additionally, the legislative history indicates that the statutory term of "sick, infirm, or aged" persons is not intended as a limiting clause, as "specialty health services," such as those concerned with mental retardation, will also be deemed covered employers under the Act.²³

It would appear that the determinative factor in questions of coverage is the existence of legitimate professional care and the connection (in both a theoretical and physical sense) between the activities in question and actual patient care and welfare. Analysis in terms of such an awkward concept certainly distinguishes services Congress did not intend to cover (such as insurance groups and diet parlors), but has not yet been refined to the point of providing a reliable standard in the occasional hybrid situation, such as ambulance-rescue teams and paramedical services. It would appear to be consonant with legislative intent, however, to resolve such questions in favor of coverage. The statutory definition is couched in terms of considerable breadth and has significant potential for administrative or judicial expansion.

B. *Jurisdictional Standards*

In determining affected employers, the issue of jurisdictional standards arises. Although the Board is empowered to exercise jurisdiction over employers engaged in interstate commerce, it may decline to do so on the basis that those interstate activities, when judged against Board-established tests, will have such a minimal impact on interstate commerce that expenditure of government resources to resolve the dispute is not warranted. The power of the Board to

of medical insurance plans. In fact, many Health Maintenance organizations are being established by insurance companies such as Blue Cross-Blue Shield.

²¹ 120 CONG. REC. 7310 (daily ed. May 7, 1974) (remarks of Sen. Taft).

²² 120 CONG. REC. 4594 (daily ed. May 30, 1974) (remarks of Rep. Thompson).

²³ *Id.*

establish jurisdictional standards is recognized by the Labor-Management Reporting and Disclosure Act,²⁴ which expressly provides that the Board may, by adjudication or published rule, decline jurisdiction in situations where there is an insubstantial effect on interstate commerce.

The Board's jurisdictional standards generally focus on the amount of the employer's annual dollar volume of interstate business. The limits apply to both representation and unfair labor practice cases. However, the promulgated standards are not absolute bars to Board jurisdiction: the Board may disregard or modify the established limits where the effect of that action would be to broaden jurisdiction.²⁵ In addition to the jurisdictional standards, the Board also has, by adjudication, declined jurisdiction over industries whose operations are deemed "local" in character.²⁶

In dealing with health care employers, the Board has asserted jurisdiction over proprietary hospitals whose gross revenue exceeds \$250,000, and nursing homes whose gross revenues exceed \$100,000.²⁷ The Board has also asserted jurisdiction over physicians' group prac-

²⁴ 29 U.S.C. § 164(c) (1970).

²⁵ As a result, the Board will exercise jurisdiction where an employer refuses to submit requested commerce data, regardless of the extent of interstate business, *Tropicana Products, Inc.*, 122 N.L.R.B. 121, 43 L.R.R.M. 1077 (1958); or where a pattern of unlawful conduct has an effect on employers both covered and excluded by the standard, so that an effective remedy, reaching all incidents of the unlawful activity, may be fashioned. *Euclid Foods, Inc.*, 118 N.L.R.B. 130, 40 L.R.R.M. 1135 (1957).

²⁶ However, in *Bio-Medical Applications of San Diego, Inc.*, 216 N.L.R.B. No. 115, (1975), the Board asserted jurisdiction over an employer who operated a community unit that provided life-maintenance hemodialysis treatments to outpatients. The employer argued that its medical services were essentially local in character, and therefore the Board should not assert jurisdiction, relying on the recent Board pronouncements in *Alameda Medical Group, Inc.*, 195 N.L.R.B. 312, 79 L.R.R.M. 1314 (1972), and *Cleveland Avenue Medical Center*, 209 N.L.R.B. No. 60, 85 L.R.R.M. 1401 (1974), where the Board declined to assert jurisdiction over similarly specialized clinics dealing primarily with local patients. The Board found these cases no longer controlling, in view of the health care amendments to the Act which extended jurisdiction to all health care institutions which have a substantial impact on commerce, even though they may be local in character. (In support of the decision, the Board noted that the employer's annual gross income exceeded current dollar volume discretionary standards applied to hospitals, nurses' associations, and retail enterprises. Additionally, the employer had a substantial inflow of materials from outside the state, indicating that the impact of the employer's operations on commerce was sufficient to warrant assertion of jurisdiction.)

²⁷ *Butte Medical Properties*, 168 N.L.R.B. 266, 66 L.R.R.M. 1259 (1967). In *Butte*, the hospital had annual gross revenues of over \$1,000,000, fifty percent of which were derived from national insurance concerns. The Board found that the nation's proprietary hospitals received about \$551,000,000 in revenue in 1965, which indicated a clearly substantial impact on commerce.

Jurisdiction over nursing homes was asserted in *University Nursing Home, Inc.*, 168 N.L.R.B. 263, 66 L.R.R.M. 1263 (1967) (proprietary nursing home) and *Drexel Homes, Inc.*, 182 N.L.R.B. 1045, 74 L.R.R.M. 1232 (1970) (non-profit nursing home).

tices. Under existing practice, employees in these generic categories, whose dollar value meets the applicable standard, will be deemed to "affect commerce" in a manner substantial enough to warrant assertion of NLRB jurisdiction.

Congress was acutely aware of the presence of such standards in NLRB practice. Senator Taft expressed the desire that "the [B]oard would continue to apply reasonable monetary standards," giving explicit approval to the existing standards developed by the Board.²⁸ The opposite view was represented by Senator Williams who would read the statutory language as being mandatory in its all-inclusive nature.²⁹

Existing jurisdictional standards present a solitary sentinel guarding against what some fear is an inexorable march to coverage of non-profit hospitals under the Act. NLRB General Counsel Peter Nash, in issuing guidelines directed to Regional Directors, has taken the position that until the Board rules to the contrary, the NLRB Regional Offices will operate under the applicable discretionary standards currently utilized for covered institutions.³⁰ Some support for this position is drawn from prior Board practice concerning use of gross revenue standards when dealing with proprietary health institutions.³¹

Moreover, the health care employer, in recognition of its special status, was afforded unique protective measures in the amendments so that it should not be *more* susceptible to NLRB coverage than its previously covered brethren. Indeed, to assert jurisdiction over employers in the health care field whose revenues do not approach those demanded for other employers would be to engage in a myopic reading of the history of NLRB activity in this field, existing precedent,

²⁸ Senator Taft not only supported the current standards of \$250,000 annual volume of business (for proprietary hospitals) and \$100,000 annual volume of business (for proprietary nursing homes), but hinted that perhaps higher levels should be established, in light of current inflationary trends. 120 CONG. REC. 3710 (daily ed. May 7, 1974).

²⁹ 120 CONG. REC. 12104 (daily ed. July 10, 1974). Representatives Ashbrook and Thompson issued a joint statement to the House of Representatives in which they generally agreed with the sentiments expressed by Senator Williams in his remarks to the Senate. However, they disagreed on the question of the impact of jurisdictional standards: they stated that the House Education and Labor Committee was "fully aware" of existing monetary standards, and that the Committee had no intention to disturb the existing standards or impinge upon the Board's discretionary powers in that regard. 120 CONG. REC. 4849 (daily ed. July 18, 1974) (remarks of Rep. Ashbrook).

³⁰ N.L.R.B. General Counsel Memorandum 74-49 (Aug. 20, 1974) [4 CCH LAB. L. REP. ¶ 9046 (1974)] (Hereinafter N.L.R.B. General Counsel).

³¹ See, e.g., Cleveland Avenue Medical Center, 209 N.L.R.B. No. 60, 85 L.R.R.M. 1401 (1974); Visiting Nursing Association, Inc., 188 N.L.R.B. 155, 76 L.R.R.M. 1271 (1971); The Swanholm, 186 N.L.R.B. 45, 75 L.R.R.M. 1282 (1970).

the doctrinal value of the amendment's evolution, and the spirit of the legislative concern in this area. To date, no Board decisions have set forth which jurisdictional standards, if any, should be applied to the private, non-profit hospital employers.³²

III. STRIKES AND PICKETING AT HEALTH CARE INSTITUTIONS

A. *Notice Requirements*

The amendments to the Act provide that a health care institution must be given a ten day advance notice by a labor organization before any picketing or strike (whether or not related to bargaining) can lawfully occur.³³ The notice provision was formulated in an effort

³² The Board, when asserting jurisdiction based on current discretionary jurisdictional standards, has left the determination of the precise monetary standards to be applied in the case of non-profit hospitals to subsequent adjudication pursuant to §§ 102 and 103 of the Board Rules and Regulations. *Marquette General Hospital*, 216 N.L.R.B. No. 44, 88 L.R.R.M. 1178 (1975); *Bio-Medical Applications of San Diego, Inc.*, 216 N.L.R.B. No. 115 (1975). In *Philadelphia College of Osteopathic Medicine*, 213 N.L.R.B. No. 44, 87 L.R.R.M. 1182 (1974), the Board asserted jurisdiction over a private non-profit corporation on the basis that the annual gross revenue from the medical school it operated exceeded the one million dollar jurisdictional standard set for private, non-profit colleges and universities. Members Miller, Jenkins and Kennedy expressly declined to decide the question of what standards should be applied to private non-profit hospitals alone. Similarly, the Board declined, in *Yale-New Haven Hospital*, 214 N.L.R.B. No. 34, 87 L.R.R.M. 1271 (1974), to make a determination of the precise monetary standards to be applied to non-profit hospitals, finding that the employer in question had an annual gross revenue of \$60 million, which was sufficient to meet any existing standard.

In *Waterloo Surgical & Medical Group*, 213 N.L.R.B. No. 61, 87 L.R.R.M. 1136 (1974), the employer contended that a partnership of medical practitioners and surgeons (whose gross volume of business was approximately 1.4 million dollars and whose gross receipts were approximately 1.3 million dollars) should not be subject to NLRB jurisdiction because the practice was essentially local in character and the impact on commerce was not substantial enough. After reviewing the gross volume of business and gross receipts figures, the Board cited the following facts of evidence of a substantial impact on interstate commerce: (a) purchases from outside the state totalled over \$33,000, (b) the clinic treated 8,245 patients, including ninety-seven from out of state (who provided nearly \$5,000 in revenues), (c) the doctors functioned as examining physicians for the Illinois Central Railroad, Rath Packing Co., and other industrial and service companies, (d) two of the doctors were certified by the Federal Aviation Administration, and (e) the group received substantial income from insurance companies, federal agencies, and public welfare agencies. Member Kennedy, while agreeing with the decision, reserved judgment as to whether the Board should assert jurisdiction over medical practitioners or clinics of "a more limited nature," as he did not interpret the amendments to the Act as requiring assertion of jurisdiction over local neighborhood doctors or clinics.

³³ Newly created § 8(g) provides:

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition, the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of Section 8(d) of this Act. The notice shall state the date and time

to protect the public interest in the continuity of general health care and the welfare of patients as the ten day notice is intended to give affected employers sufficient notice of anticipated strike or picketing activity to enable them to make adequate arrangements for continued patient care. A second purpose of the ten day notice period is to give the Board an opportunity, if charges are filed after the notice is received, to determine the legality of the strike or picketing before it has a perhaps avoidable and unjustified detrimental effect on the health care institution.

Although failure to give the required notice will be an unfair labor practice,³⁴ neither the statute nor the legislative debates delineate pertinent details, such as who should receive the notice, the mode of transmittal, how the ten-day period should be calculated, or the required scope and specificity of the notice.

In the guidelines issued to the Regional Office, the NLRB General Counsel administratively supplied the following answers:³⁵

- (a) the 8(g) notice should be served on someone who has been designated to receive the notice or through whom the institution will actually be notified;
- (b) the notice should be personally delivered or sent by mail or by mail or by telegram;
- (c) the ten-day period begins upon receipt of the notice by the employer and Federal Mediation and Conciliation Service [FMCS];
- (d) the notice should specify the dates and times of both strike and picket conduct, if both are contemplated;³⁶ and
- (e) the notice should also indicate which unit(s) will be involved in the planned action.

that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

³⁴ 120 CONG. REC. 7310 (daily ed. May 7, 1974) (remarks of Sen. Taft).

³⁵ *N.L.R.B. General Counsel*, *supra* note 30, at 15,221-22.

³⁶ Although the § 8(g) notice must be specific, the General Counsel has refused to issue a complaint where the union's notice did not explicitly mention that picketing would occur in addition to the noticed strike activity. The union's notices stated that the "strike" was to protest the employer's unfair labor practices, and thereafter, the union began picketing simultaneously with the strike. Under these circumstances, the notice was considered to indicate that the strikers would also picket. *General Counsel Monthly Report on Health Care Institution Cases*, First Report, Section III, 88 L.R.R. 10 (1975). This view seems to be somewhat inconsistent with the General Counsel's opinion that separate notices were demanded when two unions picketed a health care institution together. In view of the statutory intent to allow for preparations to insure effective patient care (which justified the necessity of notices from each union), it is suggested that specific notice of anticipated picketing activity should be demanded, in addition to the strike warning. Such notice may be necessary to allow the health care institution to arrange for insured availability and/or continued delivery of life-preserving supplies through picket lines, where such preparation might not be undertaken if it were anticipated that the strike alone would not curtail the deliveries.

The scope of the statutory notice requirement is anticipated to be expansive. For example, the General Counsel has authorized the issuance of a § 8(g) complaint where a union, without serving the required notices on FMCS and the employer, directed some off-duty employees to engage in a two-hour demonstration picket at a health care institution. Notwithstanding the facts that no deliveries or services were interrupted and the union's activity was of short duration, it was concluded that the picketing fell within the literal proscription of § 8(g).³⁷ Similarly, where an employer has multiple facilities, the General Counsel is of the opinion that a proper notice requires that the union specifically mention which particular facilities are to be the subjects of the anticipated strike, pickets, or concerted refusals to work.³⁸

This is a logical counterpart to the conclusion that all separate employers, regardless of the commonality of the labor dispute, are entitled to separate and individual 8(g) notices.³⁹ It is also in accord with the legislative intent to give health care institutions advance notice so that continued patient care will be assured at the institution, especially if the labor dispute does not concern employees of the affected institution. Even though the literal language of the statute calling for notices to be given to "the institution" would arguably be satisfied by tendering notice to the main office of a multiple facility employer, the intent of the statute is best served by an expansive, rather than a narrow, reading of the notice requirements.

The General Counsel has also authorized the issuance of a complaint where a union, without serving a separate notice, engaged in one and one-half hours of picketing activity at a health care institution with off-duty employees (thereby negating any possibility of a work stoppage), where the activity was only to lend support to another labor organization which had properly followed the 8(g) notice

³⁷ *General Counsel Monthly Report on Health Care Institution Cases*, First Report, Section I, 88 L.R.R. 8 (1975).

In another case, picketing by a construction union to protest the presence of a non-union plumbing company at a construction project on the premises of an operative health care institution, although it was not directed at any of the hospital's employees and caused no interruptions of deliveries to the hospital or work stoppages by the hospital employees, was held to be within the § 8(g) proscription of picketing "at any health care institution" without proper notice to the hospital. In the General Counsel's view, the picketing represented a potential inducement to employees of both the hospital and its suppliers to engage in work stoppages, which could have a disruptive and debilitating effect on effective patient care. *General Counsel Monthly Report on Health Care Institution Cases*, First Report, Section II, 88 L.R.R. 9 (1975).

³⁸ *General Counsel Monthly Report on Health Care Institution Cases*, Third Report, Section IV, 88 L.R.R. 182 (1975).

³⁹ See notes 84-87 *infra* and accompanying text.

and waiting procedures. In the General Counsel's view, the assisting union could not be relieved of its obligation to serve its own notices prior to engaging in its sympathetic activity. The stated rationale for this decision was that there is nothing in the legislative history of the amendments to suggest that a union may rely on another's notice, and "preparations made necessary in response to impending economic pressure by the second union may be quite different from, and in excess of, those necessitated by the threatened activity of the first union."⁴⁰

B. *Unfair Labor Practices Under Section 8(g)*

The Congressional intent is that violation of the 8(g) notice requirement will constitute an unfair labor practice separate and distinct from those presently existing. The extent of the violation, however, was again a point of contention between Senators Taft and Williams.

As in the case in the jurisdictional standard question, it appears that General Counsel Nash substantially agrees with Senator Taft. Thus violations of the notice provision will likely result in 8(b)(3) failures to bargain in good faith, in addition to 8(g) transgressions.⁴¹

In keeping with the imprecise language of the statute, the Senate and House Reports state that the paramount objective of the notice requirement is to allow for arrangement of "continuity of patient care." In this context, the House and Senate Committees stated that while a hygienic regard for timing is not mandated, it would be unreasonable for strike or picket activity to begin more than seventy-two hours after the time set forth in the tendered notice. Also, pursuant to the notice objective, if the union does not in fact begin such activity when specified in the notice, at least twelve hours additional notice must be given prior to the actual commencement of the activity.⁴² If,

⁴⁰ *General Counsel Monthly Report on Health Care Institution Cases*, Third Report, Section V, 88 L.R.R. 184 (1975). The fact that no 8(d) loss of employee status was thought to have resulted from this activity underscores the reliance on the dichotomy appearing in the statutory language where § 8(g) extends to "picketing, striking, or other concerted refusal to work at any health care institution. . . ." while § 8(d) provides for loss of employee status where an employee engages in "a strike within any notice period" specified in § 8(d) or "any strike within the appropriate period specified in subsection (g) of this section" (emphasis added).

⁴¹ Senator Taft thinks that violation of the notice requirements, applicable to "any picket or strike," will constitute an independent unfair labor practice, a refusal to bargain under § 8(b)(3), as well as an unfair labor practice under any other relevant existing sections of the Act. 120 CONG. REC. 6941 (daily ed. May 2, 1974). Senator Williams responded that if an 8(g) violation was intended also to be a refusal to bargain, it would have been explicitly declared as such. 120 CONG. REC. 12104 (daily ed. July 10, 1974).

⁴² S. REP. NO. 766, 93d Cong., 2d Sess. 4 (1974); H.R. REP. NO. 1051, 93d Cong. 2d Sess.

conversely, the strike or picket is to occur outside the seventy-two hour time period, a new ten day notice must be offered.

If a strike is called and then abandoned, the general rule should be that a new notice must be given to the employer before the activity is recommenced. Once picketing or a strike has been lawfully commenced, it is not necessary that the union maintain the activity continuously to void the necessity of service repeated notices on the employer. In this regard, if the facts and circumstances of the discontinued strike lead to the reasonable conclusion that the activity may be renewed, no new notice will be required if the activity is recommenced within seventy-two hours of the beginning of the period of inactivity. However, if the reasonably anticipated renewal occurs beyond the seventy-two hour period, the union will be required to give the employer twelve hours advance notice. Conversely, if it is reasonable to think that the strike or picketing activity has ceased, the union will be required to give twelve hours notice if the activity is to resume within seventy-two hours of the start of the interim period of inaction. Further, a new ten day notice will be necessary if the strike or picketing is resumed more than seventy-two hours after the time that it was initially discontinued.

Regulatory measures designed to fit the particular nature of the health care situation surface in consideration of specific timing of strike and picketing activity. For example, violations of the guidelines set forth above would presumably amount to unfair labor practices.

Harrasement of an employer by the repeated transmittal of ten-day notices will be deemed a refusal to bargain in good faith. Also, sporadic and intermittent strikes and/or picketing activity become a realistic potential abuse of the new legislation. While there is authority that such intermittent activity is not necessarily an 8(b)(3) violation,⁴³ the special nature and need for continuous health care services may dictate that such activity, even subsequent to repeated notices, will be considered a failure to bargain in good faith.⁴⁴

It will be noted that the language of § 8(g) deals with "any" picketing, strikes, etc. The legislative history indicates:

This subsection applies not only to bargaining strikes or pickets, but also . . . [a]s examples, . . . to recognition strikes, area standard strikes, secondary strikes, jurisdictional strikes, and the like.⁴⁵

5 (1974).

⁴³ *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477 (1960).

⁴⁴ S. REP. NO. 766, 93d Cong., 2d Sess. 4 (1974). Exactly when sporadic activity will be deemed "intermittent," and therefore bad faith bargaining, must necessarily await administrative or judicial exegesis.

⁴⁵ 120 CONG. REC. 6941 (daily ed. May 2, 1974) (remarks of Sen. Taft).

Accordingly, the NLRB guidelines state:

. . . it would appear that a health care institution would have to receive ten days' written notice before being struck or picketed, whether the institution is subjected to primary, secondary, recognition, area standards, or sympathetic strike or picketing activity. The 8(g) notice requirements would probably also apply if a health care institution becomes so enmeshed in a dispute as to become an 'ally' of a struck employer (whether or not that employer be a health care institution or an 'employer' as that term is customarily used).⁴⁶

By its express terms, § 8(g) applies only to "labor organizations." Consequently, activities of employers are not prohibited by the section (for example, lockouts). Similarly, the express language refers to "strikes," "picketing," or "concerted refusals to work" at health care institutions; therefore, other union activity unconnected to such enumerated specifics, such as handbilling,⁴⁷ should not be encompassed in the notice requirement section.

C. *Instances Where Section 8(g) Notices May Be Unnecessary*

The legislative debates enumerated at least two situations in which it was felt that the interests of the affected employees would override the notice requirements of § 8(g).

1. *Employer Unfair Labor Practices*

The first situation parallels and virtually enshrines the standing precedential authority of *Mastro Plastics Corp. v. NLRB*.⁴⁸ In that case, the United States Supreme Court considered charges brought where an employer discharged an employee for union activities, which resulted in a protest strike by other employees. The Court held that the notice period of § 8(d) did not apply to strikes that protest unfair labor practices, in the absence of any attempt to change the terms of the existing contract. The Court, through Mr. Justice Burton, reasoned that the notice provision was not included in the National Labor Relations Act, and should not be interpreted, to allow employers to have a period in which they are insulated from retaliatory strikes where unfair labor practices have been committed. Therefore, the time limits set out in § 8(d) apply to economic strikes (those

⁴⁶ *N.L.R.B. General Counsel*, *supra* note 30, at 15,228.

⁴⁷ See *Hamilton Materials, Inc.*, 144 N.L.R.B. 1523, 54 L.R.R.M. 1283 (1963), where the Board indicated that explanatory circulars may constitute a threat or be intended to induce work stoppage, in violation of § 8(b)(4).

⁴⁸ *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

to terminate or modify a contract), rather than those in protest of flagrant or serious unfair labor practices.

The weight of the comments indicate that a "serious" or "flagrant" unfair labor practice must be committed by the health care institution before the union's failure to give advance notice of picketing or strike activity will be overlooked. The legislative history indicates that the notice requirement will be excused only in "very limited situations," where an employer's unfair labor practice is so aggravated that a no-strike clause will be rendered unenforceable or ineffectual. The suggestion that the exception should be confined to unfair labor practices of the magnitude of those encountered in *Mastro Plastics* is underscored by the explicit reference in the Committee Reports to that decision, for example, Senator Taft's quote from *Mastro Plastics* that the exception applies "only where the actions of the employer 'reflect a flagrant example of interference by employers with an expressly protected right of their employees to select their own bargaining representative.'"⁴⁹

⁴⁹ 120 CONG. REC. 7310 (daily ed. May 7, 1974). This view is also supported by the comments of Representative Ashbrook. 120 CONG. REC. 4849 (daily ed. July 18, 1974). Senator Williams would not so restrict the instances where the notice is not required but would rather interpret the word "flagrant" to distinguish those cases where an employer was guilty of merely a "technical" violation of the Act from the myriad of cases where § 7 rights are interfered with by the employer. 120 CONG. REC. 12104 (daily ed. July 10, 1974).

The General Counsel has had some occasion to define the parameters of a "flagrant" or "serious" unfair labor practice, and has indicated that an employer's refusal to bargain based upon a challenge to the certification of the union was not a "flagrant" or "serious" unfair labor practice that would excuse the failure to comply with the requirements of § 8(g). *General Counsel Monthly Report on Health Care Institution Cases*, First Report, Section III, 88 L.R.R. 11 (1975).

Conversely, the General Counsel has refused to issue a § 8(g) complaint notwithstanding the fact that no notices were served, based upon an employer's "flagrant" unfair labor practices. The General Counsel concluded that the union's picketing was intended to protest the employer's course of serious § 8(a)(1) and (3) conduct which substantially impaired the employees' exercise of their statutory rights. In this instance, the employer's conduct included "the discharge of approximately nine employees, including all the leading Union adherents and sympathizers; threats of discharge or reduction in pay if the employees engaged in activity in support of the Union; interrogation of employees about their Union activities and the Union activities of their fellow employees; granting employees wage increases to discourage them from engaging in Union activity; surveillance and creating the impression of surveillance of Union activity; discriminatory enforcement of a previously unused personnel manual as a reprisal for the employees Union activities; and discriminatory transfer or threats to transfer leading Union adherents." As a result of this conduct, proceedings under § 8(g) were felt to be unwarranted, in spite of the fact that the union began its picketing activity three days prior to the time indicated in the notice which was served on the employer. The fact that the union was not an incumbent bargaining representative did not prevent application of the "flagrant unfair labor practice" excuse for failure to tender the required notice. *General Counsel Monthly Report on Health Care Institution Cases*, Second Report, Section III, 88 L.R.R. 103 (1975).

Where an employer's unfair labor practices are flagrant or serious enough to excuse the

Existing decisional pronouncements can be read to excuse required strike notices only in cases where a "willful and serious violation of the law designed to destroy the very foundation of the contract and the relationships [between the parties]"⁵⁰ has occurred or where an unfair labor practice is "destructive of the foundation upon which collective bargaining must rest."⁵¹ In view of this development of the *Mastro Plastics* doctrine and the overriding legislative intent to protect the public interest inherent in the continuity of health services, the Board should excuse the failure to tender § 8(g) strike or picket notices only in limited and exceptional circumstances.

2. Abuse of the Waiting Period

The second contemplated circumstance where failure to give notice prior to strikes or picketing will be excused in perhaps even less susceptible of precise identification than the *Mastro Plastics* situation. The Committee Reports framed the concern in the following manner:

Moreover, it is the sense of the Committee that during the ten-day notice period the employer should remain free to take whatever action is necessary to maintain health care, but not to use the ten-day period to undermine the bargaining relationship that would otherwise exist. For example, the employer would not be free to bring in large numbers of supervisory help, nurses, staff and other personnel from other facilities for replacement purposes. It would clearly be free to receive supplies, but it would not be free to take extraordinary steps to stock up on ordinary supplies for an unduly extended period. While not necessarily a violation of the Act, violation of these principles would serve to release the labor organization from its obligation not to engage in economic action during the course of the ten-day notice period.⁵²

requirements set forth in Section 8(g), they may also be so pervasive as to warrant a bargaining order without an election. See *NLRB v. Gissel Packing Company*, 395 U.S. 575 (1969). In such an event, the extent of any unlawful conduct on the part of the union must be investigated in order to determine the appropriateness of the bargaining order. See, e.g., *Lock Joint Pipe & Co.*, 202 N.L.R.B. 399, 82 L.R.R.M. 1525 (1973), where the Board reiterated the "established practice" that picket line misconduct and violence may negate the issuance of an otherwise appropriate bargaining order. In this context, the General Counsel has indicated that where a union pickets in violation of § 8(g), but where such picketing only lasts a short time and does not disrupt the operations of the health care institution, the bargaining order will nevertheless be deemed appropriate. *General Counsel Monthly Report on Health Care Institution Cases*, Second Report, Section III, 88 L.R.R. 108 (1975).

⁵⁰ *Mastro Plastics Corp.*, 102 N.L.R.B. 511, 513, 31 L.R.R.M. 1494, 1495 (1953).

⁵¹ *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 281 (1956).

⁵² S. REP. NO. 766, 93d Cong., 2d Sess. 4 (1974); H.R. REP. NO. 1051, 93d Cong., 2d

The ten-day notice period was instituted because Congress felt that it is in the public interest to insure continuous health care to the community and protection to patient services by providing for advance notification of anticipated strike or picketing at a health care institution. The special consideration of notice, unique to the health care industry, was designed to allow the employer to make "appropriate arrangements" for ongoing patient care in the event of a work stoppage.

For non-health care related employers, who have no statutory notice protection, it is not difficult to predict whether a strike will occur at the end of the contract or negotiating period. When approaching the strike the employer will assess the company's ability to survive a strike, the length of time that the strike can be endured, what union demands may be accepted, the union position of favor or disfavor with the employees, the employees' ability to endure a strike, and the probabilities that other unions will honor the inevitable picket lines. The health care institution must consider these questions as well as the paramount concern that life and health maintenance services will not be jeopardized. While the manufacturing or industrial employer considers how long he can endure employee inactivity, in an economic sense, the health care employer must consider how basic operations may be continued in the face of the strike. When the strike appears imminent, the employer must decide if non-striking personnel are to be laid off, whether work may be transferred to other affiliated plants, and whether non-union employees or permanent replacements will be hired to continue operations.⁵³

Sess. 6 (1974). Under present authority, actions that "undermine the bargaining relationship are possibly violations of §§ 8(a)(1) and 8(a)(3), which deal respectively with interference and discrimination. The special nature of the health care industry, then, does not isolate it from what are felt to be unfair protective measures, and such acts presumably should be scrutinized in terms of existing case law, with a corresponding inquiry into the motivation behind the employer's acts. See, e.g., *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB v. Brown*, 380 U.S. 278 (1965); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965). See also Oberer, *The Scierter Factor in Sections 8(a)(1) and (3) of the Labor Act*, 52 CORNELL L.Q. 491 (1967).

The Committee Reports stated that Congress was aware that work stoppages in particular hospitals, especially those in rural areas, might have a heightened effect on patient care. The Committee expressed the hope that the parties in such a situation would be "cognizant of such special problems and take steps, either in advance of any dispute, or during its resolution, to mitigate the effects of a scarcity of alternative local resources." S. REP. NO. 766, 93d Cong., 2d Sess. 5 (1974); H.R. REP. NO. 1051, 93d Cong., 2d Sess. 6 (1974). In light of this specific Congressional recognition of potential hardships and possible serious disruptions to health care in certain institutions, those employers may be afforded greater leeway in making advance preparation, in the interest of continued patient care, for strike activity.

⁵³ Section 2(3) of the Act provides that a striking worker retains his status as an "employee." Whether the employee has a right to retain his job at the termination of the strike,

Naturally, the health care employer will consider all of these issues so that appropriate action can be undertaken when the threatened strike or picketing activity eventually occurs. The statutory mandate that the existing bargaining relationship must be preserved extends by its terms only to the ten-day hiatus period, and thereafter the health care institution will be permitted to exercise the options and prerogatives available to other employers. These options necessarily include the right to replace striking employees with permanent workers.⁵⁴

The health care institution receives advance notice so that it may take whatever action is necessary to protect the continuity of patient care and health services, but it is denied the opportunity to use the notice period to prepare in such a way that would "undermine the bargaining relationship that would otherwise exist." The object of union economic activity is to interrupt the normal operations of the employer, both by withholding their own labor and appealing to sympathetic workers to do likewise, so that the employer will accede to their demands. In this sense, any activity which allows the employer to continue operations necessarily impairs the effectiveness of the union action. In determining whether acts taken by the employer undermine the bargaining relationship involves a process of balancing the rights and acts of the employer against those of the union and analyzing the effect of the employer's activity or inactivity on the public, rather than on the union.

For example, the Committee Reports state that although an employer may be able to receive supplies, he may not take "extraordinary" steps to stockpile supplies. An employer will have no difficulty procuring supplies before the strike occurs. However, it may be a reasonable desire, solely in the interest of maintaining patient care, to begin to accumulate necessary supplies if the employer knows that

however, depends on the nature of the strike. An employee engaged in a strike undertaken in response to unfair labor practices committed by the employer is entitled to be reinstated to his former position, even if the employer has hired permanent replacements. *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Conversely, where an economic strike occurs (usually as an attempt to make an employer accede to the union bargaining demands), the employer may decline to reinstate a striker if he has been permanently replaced by the time the strike terminates. *Id.* However, an employee may not be summarily discharged for engaging in an economic strike, as such activity is protected under § 7 of the Act. *NLRB v. United States Cold Storage Corp.*, 203 F.2d 924 (5th Cir.), *cert. denied*, 346 U.S. 818 (1953). If the employer has not permanently replaced the striker, he has an obligation to reinstate him upon the receipt of an unconditional request for re-employment. *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967).

⁵⁴ See *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *The Laidlaw Corp.*, 171 N.L.R.B. 1366, 68 L.R.R.M. 1252 (1968), *enfd.*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

his suppliers employ union delivery labor who will not cross the picket line that will surely appear at the end of the ten-day waiting period. In a similar vein, while an employer should not be allowed to discharge union members expected to participate in the strike, it may be a justifiable response, again in the interest of patient care, to insure that skilled and qualified personnel will be available and ready to replace striking employees. (This may become especially important if other health care employers will be reluctant to provide necessary replacements for fear that they will be termed an "ally" of the struck employer, and therefore vulnerable to picketing activity at their premises.)

The resolution of this paradox, involving what may appear to be mutually exclusive policy declarations by Congress, will be attempted through the proverbial "balancing process." General Counsel Nash has stated:

The answers to such cases depend on what Congress thought, in a broad sense, to be the balance it was striking. Quite clearly on the one hand, Congress intended that a health care institution was to have a ten-day period in which to arrange its affairs so that the lives and health of its patients would not be jeopardized by union economic action. The balance on the other hand depends upon what Congress meant by the words 'undermine the bargaining relationship that would otherwise exist.' Clearly, where an employer's action is such as might destroy the union's representative status (e.g., hiring permanent replacements during the ten days for all union members), it would seem that immediate union action would be privileged.⁵⁵

General Counsel Nash interprets the Congressional comments to posit the test that where the employer's acts exceed what is essential to the "health and life maintenance" of the patients, and instead reinforce the employer's ability to endure the economic pressure applied by the union, the ten day notice requirement is vitiated.

"[R]elevant circumstances" that would determine whether actions were taken in order to bolster the employer's ability to take the strike would be "the number of replacements being interviewed and/or hired, the permanency of the replacements, the number and type of supplies being ordered, the nature of the patients' illnesses, and the willingness of the union to permit the passage of supplies and personnel through its picket lines."⁵⁶ Listing these factors is an attempt to provide an objective test for a policy question focusing on

⁵⁵ *N.L.R.B. General Counsel*, *supra* note 30, at 15,231.

⁵⁶ *Id.*

subjective results.

When the employer's activities are deemed to undermine the bargaining relationship, the union will be released from the notice provisions set out in the new amendments. Board inquiry into these activities will become frequent, not only to examine the defense to 8(g) charges brought by the employer,⁵⁷ but also to investigate before the Board issues injunctive relief to halt union activities taken without the requisite statutory notice.

D. Impact on Employees

1. Independent Employee Acts

In order for concerted employee actions to be protected by § 7 of the Act, it is not necessary that a formal organization be involved, or, if the employees are represented, that the representative approve or direct the employees' acts.⁵⁸ Employees are generally protected if their acts are designed to further the interests of a group of workers, and not merely to benefit a particular individual, as such acts will be considered "concerted activities for the purpose of . . . mutual aid or protection" under § 7 of the Act.⁵⁹ Such concerted activities normally must pursue available grievance procedures to be protected actions,⁶⁰ but often group action will be sanctioned where no grievance procedure is available⁶¹ or where extraordinary facts exist.⁶²

⁵⁷ In this regard, it may be necessary for the Board to develop standards to insure that the labor organization was actually aware of the acts taken by the employer in derogation of the bargaining relationship, before the notice requirement is retroactively excused.

⁵⁸ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). In the *Washington Aluminum* decision, the Supreme Court held that a walkout by unrepresented employees, where the temperature in the plant was only eleven degrees, was a "labor dispute" within § 2(9) of the Act and that the walkout was concerted activity for mutual aid and protection within the meaning of § 7. Discharge of striking employees therefore violated § 8(a)(1) of the Act. See also *NLRB v. Plastilite Corp.*, 375 F.2d 343 (8th Cir. 1967); *NLRB v. Maydale Products Co.*, 311 F.2d 890 (5th Cir. 1963). *Cf.* *NLRB v. Texas Natural Gasoline Corp.*, 253 F.2d 322 (5th Cir. 1958).

⁵⁹ *Pacific Electriccord Co. v. NLRB*, 361 F.2d 310 (9th Cir. 1966).

⁶⁰ *Farmers Union Cooperative Marketing Ass'n.*, 145 N.L.R.B. 1, 54 L.R.R.M. 1298 (1963).

⁶¹ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

⁶² *Knight Morley Corp.*, 116 N.L.R.B. 140, 38 L.R.R.M. 1194 (1956), *enf'd*, 251 F.2d 753 (6th Cir. 1957).

Concerted activity, whether in support of grievances or as a means of bringing economic pressure to support employee negotiations, is protected conduct unless it is found to be beyond the bounds of legitimate protest, such as set forth in the *Fansteel* decision. *NLRB v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939); *Masonic Eastern Star Home*, 206 N.L.R.B. No. 127, 84 L.R.R.M. 1353 (1973). Accordingly, the General Counsel has authorized the issuance of a § 8(a)(1) complaint where employees were discharged when they attempted, as a group, to discuss working conditions with their employer beyond their break period, even

Strike activity may be unlawful if it has an unlawful purpose⁶³ or if it employs unlawful means to accomplish a lawful object.⁶⁴ For example, failure to give notices required under § 8(d)⁶⁵ or contravention of a valid no-strike clause in the bargaining agreement may render strikes illegal. If strike activity is deemed unlawful, it is then unprotected activity.

The time notices set forth in § 8(g) of the new legislation apply only to labor organizations. However, in considering strike or picketing activity by employees who either act without the authority of their union or belong to no union, Senator Taft remarked that such employees would have "no greater rights or fewer obligations," in the context of § 8(g), than labor organizations. Consequently, employees are required to give the required ten-day notice to the health care institution before engaging in strike or picketing activity.⁶⁶ The consequence of the failure to give the required notice, while not a technical violation of § 8(g), is that the actions of the employees would be deemed "unprotected," and the employer would be free to discharge them or take disciplinary measures.⁶⁷

though they failed to comply with the notice requirements of § 8(g) prior to the action. The employer had disciplined the employees on the ground that they were engaging in a "work stoppage" under the Act. The General Counsel reasoned that the actions would constitute protected activity unless the employees were deemed to be engaged in a "strike or concerted refusal to work" without having served the § 8(g) notices. In this particular instance, no work stoppage within the meaning of § 8(g) was found, but the clear implication of the General Counsel's decision is that employees may be discharged or disciplined where they engage in what is found to be a work stoppage where the necessary statutory notices are not served. *General Counsel Monthly Report on Health Care Institution Cases*, Third Report, Section III, 88 L.R.R. 181 (1975).

⁶³ Unlawful purposes include striking for an illegal objective, *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939); jurisdictional strikes, *NLRB v. Radio & Television Broadcast Engineers*, 364 U.S. 573 (1961); strikes for recognition where another union is certified, *Bonnaz Hand Embroiderers*, 111 N.L.R.B. 82, 35 L.R.R.M. 1424 (1955), *enforcement denied on other grounds*, 230 F.2d 47 (D.C. Cir. 1956); and strikes in the face of no-strike clauses, *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944).

⁶⁴ Unlawful means include sit-down strikes, *Apex Hosiery Co. v. Lender*, 310 U.S. 469 (1940); strikes by a minority of employees without the authorization of the majority, *Plasticline, Inc. v. NLRB*, 278 F.2d 482 (6th Cir. 1960); partial strikes, *NLRB v. Blade Mfg. Co.*, 344 F.2d 998 (8th Cir. 1965); and strikes involving aggravated violence, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954).

⁶⁵ See, e.g., *United Furniture Workers of America v. NLRB*, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964); *Rocky Mountain Prestress*, 172 N.L.R.B. 793, 68 L.R.R.M. 1325 (1968).

⁶⁶ 120 CONG. REC. 6941 (daily ed. May 2, 1974).

⁶⁷ See, e.g., *United Parcel Service*, 205 N.L.R.B. No. 163, 84 L.R.R.M. 1098 (1973), where the Board upheld discharges when employees picketed in the face of a valid no-strike clause without invoking the grievance machinery of the contract. Acts that undermine the prerogatives of the bargaining representative have been held to be unlawful. See, e.g., *NLRB*

2. *Loss of Employee Status*

Section 8(d) of the Act provides that employees who engage in strike activity, as opposed to mere picketing, during the mandated sixty-day notice period will lose their rights as employees under the Act. As a result, they will not be entitled to reinstatement to their vacated positions nor will they be able to vote in any elections conducted during their absence.⁶⁸ The notice must be given to the FMCS, appropriate state agencies, and the employer; failure to give notice to the federal and state mediation services results in a § 8(b)(3) violation, even if notice was given to the employer.⁶⁹

Section 8(d) previously read: "Any employee who engages in a strike within the sixty-day period specified in this subsection, shall lose his status as an employee" The new language modifies that section:

Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute. . . .

Therefore, an employee may lose his protected status for engaging in strike activity where the notice requirements of §§ 8(d) or 8(g) have not been met.⁷⁰

Employees who only picket, rather than engaging in strikes or work stoppages which violate § 8(g), do not automatically lose their status as employees under § 8(d). However, where the picketing results in individual refusals to cross the picket line (as opposed to a

v. Draper Corp., 145 F.2d 199 (4th Cir. 1944); *Plastic-line, Inc. v. NLRB*, 278 F.2d 482 (6th Cir. 1960). *But see Hoffman Beverage Co.*, 163 N.L.R.B. 981, 65 L.R.R.M. 1011 (1967) where the Board stated that an employer violated the Act by discharging employees who refused to cross picket lines despite their union's instructions to keep working. The Board found that the union had impliedly supported the employees' actions, but in any event the refusal to work was not in derogation of the union's bargaining position.

In *Electrical Workers v. NLRB*, 202 F.2d 186 (D.C. Cir. 1952), the court stated that the protections afforded by § 7 of the Act are withdrawn if the concerted activities contravene specific provisions or "basic policies" of the Act. This would appear to apply to the notice provisions of § 8(g), in light of the remarks of Senator Taft and Representative Ashbrook and the "basic policy" of affording advance notice of strikes or picketing to the health care institution so that the ultimate goal of patient health care may be maintained.

⁶⁸ *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957); *United Packinghouse Workers v. NLRB*, 210 F.2d 325 (8th Cir.), *cert. denied*, 348 U.S. 822 (1954).

⁶⁹ *United Furniture Workers v. NLRB*, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964).

⁷⁰ *Fort Smith Chair Company*, 143 N.L.R.B. 514, 53 L.R.R.M. 1313 (1963), *enfd*, 336 F.2d 738 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 838 (1964).

concerted work stoppage), a violation of § 8(g) will nonetheless occur if the required notices have not been tendered. As a result, participation in the illegal picketing will amount to unprotected activity, and any ensuing discharges for that reason would be privileged.⁷¹ Moreover, reinstatement of discharged employees will be denied where a strike is conducted in an unlawful manner or for an unlawful objective.⁷²

As the worker's status as an "employee" is determined by the Board, the possibility that this protected status may be lost increases the importance of Board determinations regarding the legality of strikes or pickets. For example, if the noticed strike does not occur as scheduled and a hygienic regard for the remainder of the statutory elements is not practiced by tendering an additional twelve hours notice, it is possible that striking employees will lose their protected status, even though the required initial notice was actually given to the employer. The vulnerable position of employees, acting either alone or on directions from their labor organization, and their good faith in engaging in the questioned activities, will be factors to be balanced in Board review of and determination of appropriate remedies for alleged unlawful strikes and picketing. These statements "greatly alarmed" Senator Williams, who felt that the drafting committee never intended such a harsh result for the 8(g) violations.⁷³ He believed the Board should be very hesitant to attach such Draconian consequences to the ill-considered actions of the employees or their union leaders.⁷⁴

While the resolution of this operational dichotomy will presumably be left to administrative or judicial epiphany, it appears that the intent of the amended Act is clearly that if a strike is undertaken in derogation of the ten-day notice period of § 8(g) (as well as those within § 8(d), the employee will forfeit his protected status. While this may be a "harsh" result for the unwitting employee, it is no more harsh than the probable consequences of violations of the previous

⁷¹ *Claremont Polychemical Corp.*, 196 N.L.R.B. 613, 80 L.R.R.M. 1130 (1972).

⁷² *NLRB v. Drivers Local 639 (Curtis Bros., Inc.)*, 362 U.S. 274 (1960).

⁷³ 120 CONG. REC. 12104 (daily ed. July 10, 1974).

⁷⁴ The General Counsel has concluded that no violation of §§ 8(a)(3) and (1) occurred where an employer discharged employees after a strike occurred without prior service of the notice required under § 8(g). In this case, the discharged union president had instructed employees to honor a picket line, and it was also found that the pickets had induced other employees to refrain from crossing the picket line. Because the union was therefore held responsible for the work stoppage and had struck and picketed in violation of Section 8(g), the participating employees lost their "employee" status by virtue of Section 8(d). The discharges were therefore not violations of the Act. *General Counsel Monthly Report on Health Care Institution Cases*, Third Report, Section IV, 88 L.R.R. 182 (1975).

language of § 8(d), and it appears to be consistent with the paramount legislative intent to protect health care employers from surprise strikes. The fact that employees may lose their protected status, allowing the employer to discharge and permanently replace them, may have the *in terrorem* effect of making the unions especially careful to abide by the notice requirements. As a subsidiary effect, the "harshness" of the statute will, as a practical matter, place great emphasis on the two situations in which strike activity is sanctioned without the § 8(g) notices.

The employee will not lose his protected status if the strikes are to protest "flagrant" or "serious" unfair labor practices by the institution, or where the conduct is occasioned by the employer's abuse of the ten day notice period.⁷⁵ In this regard, the exception to § 8(g) will insulate, or retroactively excuse, employee economic activity during that period, even though the justification arises after the initial violation.

However, where it is decided that, for example, no "flagrant" unfair labor practices have been committed to excuse union activity, and a resulting violation of § 8(g) occurs, it is still possible that while the employees may be engaged in unprotected activity, they will not automatically lose their "employee" status, unless it is shown that the employees had engaged in a strike, as distinguished from mere picketing. This conclusion is based upon the statutory language of § 8(d) which provides for loss of employee status where an employee engages in "any *strike* within the appropriate period specified in subsection (g)" The distinction between "loss of employee status" and "unprotected conduct" becomes critical in the discharge situation. If an employee engages in unprotected activity, the employer may lawfully discharge the employee, provided that the discharge is the result of that activity (*i.e.*, the picketing), rather than for reasons unrelated to that conduct. Therefore, although the employees may be subject to discharge for unprotected activity,⁷⁶ they do not lose their status under the Act, and an employer may not justify a discharge or refusal of reinstatement actually based on unrelated discriminatory reasons on the pretext of the unprotected conduct.

E. *Threats to Strike or Picket*

When Congress instituted the requirement of a ten-day notice period prior to commencement of a strike or picket activity at a health care institution, it also considered the occasion where a labor

⁷⁵ See notes 48-57 *supra* and accompanying text.

⁷⁶ Claremont Polychemical Corp., 196 N.L.R.B. 613, 88 L.R.R.M. 1130 (1972).

organization would merely threaten such action within the protected time period, with perhaps as debilitating an impact on the bargaining stance of the employer as if the activity had actually occurred.

Clearly, the law provides that a ten-day notice must be given before any picketing or strike may commence at a health care institution. However, the amendment makes no mention of threats to engage in such activity. In a literal and simplistic sense, the amendment can be read to restrict only the actual activities mentioned, and consequently, no violation of § 8(g) would arise without the actual commencement of the strike or picketing. Such a view was propounded by Senator Williams, who rejected any interpretation that § 8(g) would make the mere intent to withdraw services without giving the requisite notice an unfair labor practice.⁷⁷ In Senator Williams' opinion, if Congress had intended the mere threat to engage in the activity to be a violation, it would have explicitly stated so, as it previously had done when it enacted § 8(b)(4),⁷⁸ concerning unlawful secondary activity.

The General Counsel has refused to issue a § 8(g) complaint where a union threatened to strike or picket and where no § 8(g) notices were given, unless it could be found that the threats contained an indication that the strike or picket would occur at a specific date in the future. In the General Counsel's view, a threat to strike or picket will amount to a violation only where the threats indicate that the activity will take place within the prohibited time frame. However, a threat to engage in a strike or picket without specifying a date and time might constitute a violation of § 8(g) if "the surrounding circumstances" reveal an intention to strike or picket at a proscribed time.⁷⁹

On the other hand, it was clearly recognized that actions in violation of the notice requirements of § 8(g) can be enjoined by the Board, which would indicate that a charge and complaint should issue upon the mere threat to picket without the requisite notice. The legislative history also indicates that one of the purposes of the notice requirement is to give the NLRB the opportunity, after a complaint is filed, to ascertain the legality of the strikes or pickets *before* they

⁷⁷ 120 CONG. REC. 12103 (daily ed. July 10, 1974). Senator Williams did suggest however, that violations of § 8(g) can be remedied by resort to § 10(j), which allows the NLRB to seek an injunction to curtail the unfair practice.

⁷⁸ *Id.* at § 12104.

⁷⁹ *General Counsel Monthly Report on Health Care Institution Cases*, First Report, Section I, 88 L.R.R. 8 (1975). Therefore, it is suggested that the employer, upon receiving threats of such actions, question the union concerning the precise time that the union plans to begin the threatened conduct.

occur.⁸⁰ It is clear that the labor organizations have a right to strike or picket, unless such action would be unlawful. The unlawful nature of the activity may arise not only from a failure to give notices, but also because it violates related sections of the Act, such as unlawful secondary pressure, or recognitional or organizational pickets at an institution where another union is currently certified. If a union gives notice of a strike or picketing and the noticed employer concludes that such activity would be unlawful, it would be consonant with the legislative intent to protect the continuity of patient care that the threatened employer be able to enlist the remedial powers of the NLRB before the debilitating activity actually occurs.

Moreover, continuing threats to either the primary employer or peripheral employers, if not an unlawful activity, would have the effect of jeopardizing patient care and would allow the union to bring effective pressure to bear on the employer without suffering a corresponding economic hardship. Although the threat may amount to a violation of other sections of the Act (e.g., §§ 8(b)(4), 8(b)(7), or 8(b)(3)), it is not clear that such sections will adequately guard the interests Congress sought to protect, especially given the multitude of fact situations in which the threat may be communicated. Congressional concern that health care institutions be given some protection from abusive threats and that patient care be uninterrupted might be best served by allowing Board involvement upon the filing of a complaint seeking injunctive relief while unlawful activity is merely threatened, before its full impact is suffered.

F. *Secondary Activity*

Section 8(b)(4) of the National Labor Relations Act⁸¹ prohibits union conduct which is intended to induce strikes or concerted work stoppages by employees in the course of their employment with the object of forcing any employer or person to cease doing business with another employer or person. Section 10(1)⁸² provides that an injunction can be sought from a federal district court if reasonable grounds exist to believe that a secondary boycott has occurred, and § 303 of the Labor Management Relations Act⁸³ allows for the recovery of damages occasioned by the unlawful activity proscribed in § 8(b)(4).

The policy that demands that innocent third parties be protected

⁸⁰ S. REP. NO. 766, 93d Cong., 2d Sess. 4 (1974); H.R. REP. NO. 1051, 93d Cong., 2d Sess. 5 (1974); 120 CONG. REC. 6932 (daily ed. May 2, 1974) (remarks of Senator Cranston).

⁸¹ 29 U.S.C. § 158(b)(4) (1970).

⁸² 29 U.S.C. § 160(1) (1970).

⁸³ 29 U.S.C. § 187 (1970).

from labor disputes "not their own" affords no protection to an employer who is so closely identified or allied with the primary employer that he ceases to be a neutral. Accordingly, the Board has held that the secondary boycott provisions of the Act are not intended to protect an employer who cooperates with the employer that is the object of the union activity and who performs the work that the affected employer is unable to complete. The "ally doctrine" has been developed to allow union activity to be directed toward an employer who so aids the primary target of the union activity.⁸⁴

Both the House and Senate Committee Reports contained this identical language:

It is the sense of the Committee that where such secondary institutions accept the patients of a primary employer or otherwise provide life-sustaining services to the primary employer by providing the primary employer with an employee or employees who possess critical skills, such as an EKG technician, such conduct shall not be sufficient to cause the secondary employer to lose its neutral status. It should be clear, however, that where a secondary employer enmeshes itself into the primary dispute by providing supervisors, nurses or staff other than those described, it loses its status of neutrality.⁸⁵

The strict ally doctrine has thus been modified, congruent with congressional interest in continued patient care. It is readily apparent that the objective sought is the protection of the interchange of employees who possess critical skills so that the congressional goal of uninterrupted health care services may be attained. Thus, the Board will be engaged in evaluating the "critical" nature of an employee's skills as well as whether the aid given by the purportedly neutral employer is designed to preserve the integrity of the health care or, conversely, to allow the primary employer to withstand the union activity.

The General Counsel has opined that if the ally employer were to be struck or picketed, the ten day notice required under § 8(g) must nevertheless be given prior to the commencement of such activity.⁸⁶ Notwithstanding Senator Williams' disagreement,⁸⁷ it would appear

⁸⁴ *Laundry, Cleaning & Dye House Workers*, 164 N.L.R.B. 426, 65 L.R.R.M. 1091 (1967). The United States Supreme Court has not committed itself as to the ally doctrine. Sen. Taft stated that he has "serious questions" as to the legal validity of the doctrine. 120 CONG. REC. 6941 (daily ed. May 2, 1974).

⁸⁵ S. REP. NO. 93-766, 93d Cong., 2d Sess. 6 (1974); H.R. REP. NO. 93-1051, 93d Cong., 2d Sess. 7 (1974).

⁸⁶ *N.L.R.B. General Counsel*, *supra* note 30.

⁸⁷ 120 CONG. REC. 12105 (daily ed. July 10, 1974).

that where the "ally" is a health care institution, it would be consonant with the paramount congressional objective of protecting the public and the continuity of health services that the notice periods be afforded these employers also. Although it is arguable that an ally will be cognizant of its involvement in an ongoing labor dispute and that it should therefore accept the consequences of its acts, Congress has recognized that some aid to struck employers is not only allowed but necessary.

The possible abuse inherent in requiring that the ten day notices be tendered to the assisting employer is that the "ally," upon receipt of the notice of intended strike or picket activity, will suspend the assistance to the struck employer, wait 72 hours (thereby necessitating an additional ten day notice from the union), and then resume his efforts. To obviate this emasculation of the notice protection the original notice given to the "ally" should be construed to cover all later instances of assistance, as long as the form of the assistance remains unchanged.

The supply of critical services should be encouraged rather than discouraged, so that in close cases the "ally" should be notified when the union considers his actions to be of a non-critical nature. When a disinterested employer lends employees with apparently critical skills to a struck institution, it has no real control over the manner in which those employees are utilized. Moreover, if the neutral employer (either another health care institution or a supplier of necessary articles) provides requested supplies to the struck employer, it has little or no way of knowing if such supplies are critically needed or if they are merely being stockpiled, nor is it able to control the manner in which the supplies may be used. Where the public interest is paramount, employers should be encouraged to err on the side of continuing health care services.

G. *Recognitional and Organizational Picketing*

Section 8(b)(7)⁸⁸ places limitations on picketing, where an object of that activity is "recognition," "bargaining," or "organization." In those cases where recognitional or organizational picketing is countenanced, its duration may nevertheless be limited to a reasonable period "not to exceed thirty days," unless a representation petition is filed prior to the expiration of that period. Without such a filing, picketing beyond whatever is deemed to be a "reasonable period" will result in a violation of § 8(b)(7)(C).⁸⁹

⁸⁸ 29 U.S.C. § 158(b)(7) (1970).

⁸⁹ See, e.g., *Hod Carriers, Local 840 (C.A. Blinne Const. Co.)*, 135 N.L.R.B. 1153, 49

Both Committee Reports contained the following language:

In recognition picketing cases under Section 8(b)(7)(C), the National Labor Relations Board has ruled that a reasonable period of time is thirty days absent unusual circumstances such as violence or intimidation. It is the sense of the Committee that picketing of a health care institution would in itself constitute an unusual circumstance justifying the application of a period of time less than thirty days.⁹⁰

Senators Williams and Taft disagreed as to whether such picketing should be completely banned, or whether it should be allowed only in the most "exceptional" circumstances. Senator Williams concluded that, in the absence of violence, picketing at a health care institution for a period less than thirty days would not necessarily be inappropriate.⁹¹ Conversely, Senator Taft stated:

I can think of no justifiable reason for recognition picketing of a health care institution and would expect the Board to permit such picketing only in the most exceptional circumstances, and then for a period of time substantially less than 30 days.⁹²

The legislative history resounds with proclamations that enactment of the amendment will decrease the frequency of, and obviate the need for, recognitional strikes in the health care industry. While the occasion and necessity for recognitional picketing should be reduced, it is not improbable that they will occur. It is submitted that the Committees' language that such picketing is itself an "exceptional circumstance," coupled with the overriding concern for effective patient care, should provide sufficient impetus and justification for swift Board action to curtail quickly the picketing activity.

It is anticipated that a new standard will be developed which will define what will be deemed to be a "reasonable" time for recognitional or organizational picketing activity at a health care institution. General Counsel Nash indicates that relevant factors in the development of such a standard would include "the nature of the illness being

L.R.R.M. 1638 (1962). The Board has exercised its discretion to determine when circumstances justify shortening the thirty day period set out in the statute. Ten days, for example, was held to be unreasonable when picketing was accompanied by acts of violence or intimidation. *Cuneo v. United Shoe Workers of America*, 181 F. Supp. 324 (D.N.J. 1960). Additionally, where an employer suffered severe economic damage, fifteen days was held to be unreasonable. *Elliott v. Sapula Typographical Union No. 4809*, 45 L.R.R.M. 2400 (N.D. Okla. 1959).

⁹⁰ S. REP. No. 766, 93d Cong., 2d Sess. 6 (1974); H.R. REP. No. 1051, 93d Cong., 2d Sess. 7 (1974).

⁹¹ 120 CONG. REC. 12105 (daily ed. July 10, 1974).

⁹² 120 CONG. REC. 6940 (daily ed. May 2, 1974).

treated at the picketing institution" and "the effects of the picketing on the institution's ability to treat its patients."⁹³

H. *Section 10(j) Injunctive Relief*

The NLRB is given the power to petition a federal district court for temporary relief or restraining orders after the issuance of a complaint charging an unfair labor practice. Injunctive relief has been granted where the notice requirements of § 8(d) of the Act have not been met.⁹⁴

Due to the need to avoid disruption of patient care, the Committee Reports state that the failure to give statutory notice required by § 8(g) will be met with remedial action under § 10(j) of the Act.⁹⁵ Therefore, the new unfair labor practice of striking or picketing a health care institution without first giving ten days notice will be met with the injunctive relief response. However, the initial indication is that this injunctive relief will not be forthcoming upon the mere threat to strike or picket in contravention of the ten day notice requirement.⁹⁶

It has also been suggested that the public "right" to uninterrupted health care, especially in the event of the threatened discontinuance of health care (including emergency treatment) to potentially large segments of a population, would permit invocation of the injunction provisions of § 208 of the Taft-Hartley Act.⁹⁷ Senator Javits would favor an amendment to the National Emergency provision of the Taft-Hartley injunction sections, designed to cover regional rather than only national health and safety emergencies. Such an amendment would be similar to § 10 of the Railway Labor Act, which basically provides a sixty-day "cooling off" period in the case of a labor dispute which "threatens to deprive any section of the country of essential transportation services."⁹⁸

IV. BARGAINING PROCEDURES

A. *Section 8(d)*

Existing § 8(d) has been amended by modifying the notice provi-

⁹³ *N.L.R.B. General Counsel*, *supra* note 30, at 15,245.

⁹⁴ *See, e.g.,* *McLeod v. Local 147, AFL-CIO*, 292 F.2d 358 (2d Cir. 1961); *Kaynard v. Communication Workers of America*, 72 L.R.R.M. 2876 (E.D.N.Y. 1969).

⁹⁵ S. REP. NO. 766, 83d Cong., 2d Sess 4 (1974); H.R. REP. NO. 1051, 93d Cong., 2d Sess 5 (1974).

⁹⁶ *N.L.R.B. General Counsel*, *supra* note 30.

⁹⁷ 120 CONG. REC. 6941 (daily ed. May 2, 1974) (remarks of Sen. Taft).

⁹⁸ 120 CONG. REC. 6935 (daily ed. May 2, 1974).

sions of that section to require (a) ninety day notice prior to the termination or expiration of a contract, (b) sixty day notice to the Federal Mediation and Conciliation Service (and appropriate state agency) prior to the termination or expiration of a contract, (c) thirty day notice to the FMCS, required in the instance of initial contract negotiations, and (d) participation by the health care institution and labor union in mediation at the direction of the FMCS. It is clear from the legislative history that, while these new provisions apply strictly to the health care institution, all of the existing prohibitions and requirements of § 8(d) will also apply to that industry, including the prohibition on strikes or work stoppages during such periods.⁹⁹

The new language of § 8(d) provides that a party that desires to modify or terminate an existing contract in the health care industry must serve written notice of the proposed modification or termination upon the other party to the contract ninety days prior to the expiration date of the contract. Thereafter, both the FMCS and the applicable state agency must be notified sixty days prior to the actual or proposed termination or modification date.

The new statutory language provides:

Whenever the collective bargaining involves employees of a health care institution . . . the notice period of section 8(d)(3) shall be sixty days.

After literally substituting the sixty day language, § 8(d)(3) would read that the party desiring the termination or modification must "notify the Federal Mediation and Conciliation Service within sixty days after such notice of the existence of a dispute" A labor union could comply with the statutory language by serving written notice of proposed modification on the hospital ninety days prior to the expiration date of the contract and simultaneously notifying the FMCS of the existence of the dispute.¹⁰⁰

Under § 213(c), a maximum thirty day period is set within which a Board of Inquiry may be established pursuant to § 213(a), and during which no change in the status quo may be made by the parties to the controversy. Presumably, after this thirty day hiatus, the parties are free to act pursuant to their best interests. Under the above-

⁹⁹ 120 CONG. REC. 6941 (daily ed. May 2, 1974) (remarks of Sen. Taft).

¹⁰⁰ The FMCS reports that some difficulties have been encountered with respect to negotiations for initial contracts. Early practice under the amendments shows that unions file notices of disputes as a matter of course, as a self-protective measure. The effect of such a filing is that the FMCS must then decide within ten days whether or not to appoint a Board of Inquiry, even though bargaining is progressing without any evidence that a strike will result. The FMCS investigations concern the availability of health care services in the affected locality, and those investigations tend to be time-consuming and often unnecessary.

described scheme, the labor union could bring effective pressure to bear on the employer, unhampered by the status quo standard, as much as thirty days prior to the termination of the contract.

This reading of the statute is untenable in terms of a rational consideration of the goals and objectives of the legislation and in light of its legislative history. It is clear that Congress intended that the FMCS be notified within sixty days of the termination or modification date, rather than the date that notice is given to the health care institution. The Committee Reports state that:

Under the existing provisions of the National Labor Relations Act, an employer or a labor organization is required, where a collective bargaining agreement is in effect, to provide written notice to the other party . . . at least sixty days prior to the termination or modification date. . . .

The bill extends the sixty day notice to ninety days and requires the Federal Mediation and Conciliation Service to receive sixty days notice instead of thirty days, in the case of health care institutions.¹⁰¹

The FMCS and the applicable state agencies were intended to receive notice within thirty days after the notice given to the employer; more importantly, they were intended to have at least sixty days in which to attempt to mediate or conciliate the potential dispute. This construction is supported by the abundant remarks in the legislative history regarding the sixty day notice requirement to the FMCS,¹⁰² the patent objectives of the statute, and its logical integration with the provisions of § 213. Any other reading would contravene the basic admonition against exalting form over substance.

The effect of the new provisions is that the existing contract must remain in full effect during a ninety day period, in which it is anticipated that the parties will negotiate toward meaningful settlement of the differences between them. To further the parties' ability to resolve these differences, the FMCS and its potential offspring, the Board of Inquiry, must also be involved in the settlement procedure. Neither party may engage in a strike or a lockout during this time period.

In the case of bargaining for an initial agreement, the law provides that thirty days notice of the existence of a dispute must be given to the agencies set forth in § 8(d)(3). When this notice require-

¹⁰¹ S. REP. NO. 93-766, 93d Cong., 2d Sess. 5 (1974); H.R. REP. NO. 93-1051, 93d Cong., 2d Sess. 6 (1974).

¹⁰² 120 CONG. REC. 6934 (daily ed. May 2, 1974). *See also*, 120 CONG. REC. 12103 (daily ed. May 2, 1974) (remarks of Sen. Williams); *Id.* at 6941 (remarks of Sen. Taft); 120 CONG. REC. 6932 (daily ed. July 11, 1974) (remarks of Sen. Cranston); *Id.* at 6935 (remarks of Sen. Javits); *Id.* at 4589 (remarks of Rep. Ashbrook); *Id.* at 4592 (remarks of Rep. Kemp); *Id.* at 4600 (remarks Rep. Erlenborn); *Id.* at 6392 (remarks of Rep. Thompson).

ment is combined with the ten day notice provision previously discussed, it is clear that an effective period of forty days exists during which the parties may negotiate their differences, and during which no strike or lockout may occur.¹⁰³

B. Mediation

In addition to the notice requirements and time restrictions contained in § 8(d), the health care institution and labor organization will be required to participate in mediation at the direction of the FMCS.

The new legislation adds an entirely novel section to the National Labor Relations Act, § 213, which deals with conciliation of labor disputes in the health care industry. This section states that if the Director of the FMCS concludes that strike or lockout activity will "substantially interrupt the delivery of health care in the locality concerned," and impartial Board of Inquiry may be convened "within thirty days after the notice to the Federal Mediation and Conciliation Service" required by § 8(d)(3), or within ten days after the notice required where the bargaining is for an initial agreement. This Board is to make a written report to the parties, within fifteen days after the establishment of the Board, to recite the findings of fact along with recommendations for "prompt, peaceful and just settlement of the dispute." Once the Board is established, and for fifteen days after its report has been issued, the parties may not change the status quo "in effect prior to the expiration of the contract" or "in effect prior to the time of the impasse," except by agreement.¹⁰⁴

¹⁰³ An employer's duty to bargain with the union may be suspended or extinguished if the union engages in strikes or picketing in violation of § 8(d)(B) or § 8(g) of the Act. In *NLRB v. Fort Smith Chair Company*, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964), the evidence showed that employees had engaged in a strike without giving the required notice, that the discharge of the employees was therefore lawful, and that the employer had no duty to bargain with the union after it had lost its majority status. In *United Electrical, Radio & Machine Workers v. NLRB*, 223 F.2d 228 (D.C. Cir. 1955), the court held that where a strike occurred without the required notice to the employer and FMCS, the strikers immediately lost their status as employees, and the company could thereafter cancel and rescind the collective bargaining agreement.

¹⁰⁴ Once a union desires to withdraw the notice to FMCS and call off the Board of Inquiry investigation, it must notify the FMCS that it does not intend to strike and that the Board of Inquiry is unnecessary. FMCS must also receive a similar notice from the employer before the statutory procedure can be aborted. 87 Lab. Rel. Rep. 144 (1974).

The FMCS reports that the new legislation has resulted in more activity for the Service than was originally anticipated. As of September 25, 1974, about two months after the enactment of the bill, and one month after its effective date, the FMCS had received 325 § 8(d)(3) notices of initial contract disputes or intent to modify existing agreements. As of that date, however, the FMCS had appointed only one Board of Inquiry, and the FMCS Director of Mediation Services indicated that most parties would rather come to their own settlement than have the Inquiry Board appointed. 87 Lab. Rel. Rep. 144 (1974).

From the language of § 213, the conciliation procedure is to apply to disputes arising before contract termination or during negotiations for an initial agreement. As such, it will not be invoked when a strike occurs during the contract term or after the contract was terminated, and for example, would have had no interplay in resolution of strikes such as that which crippled New York City in 1973 or the 1974 California nurses' strike.

The procedure as outlined is an embodiment of the House desire to write an explicit "cooling off" period into the new legislation. Representatives Clay and Erlenborn proposed an amendment which gave the FMCS the discretionary power to impose a sixty day cooling off period after the statutory negotiation period had expired. For the first thirty days of this period, a special fact finding board would have been appointed. The remainder of the time, still under the stabilizing blanket of the status quo restriction, would have been devoted to negotiations and, hopefully, resolution of the dispute.¹⁰⁵ The cooling off period was analogized to the experiences and existence of similar provisions under the Railway Labor Act.¹⁰⁶ Communities and areas effectively served by only one hospital might particularly have benefited from passage of the amendment.¹⁰⁷

Opponents argued that the cooling off period would not afford the desired additional opportunity to resolve the issues between the parties without sacrificing the public concern for health care.¹⁰⁸ Rather, according to this argument, it would only prolong and interfere with the obligations to bargain in good faith, as positions would become inflexible in anticipation of real resolution during the "extra" negotiating stage.¹⁰⁹ The decision was ultimately made that the legislation would adequately encourage dispute resolution prior to contract termination, without prolonging tensions and emotions inherent in such situations to a period of five months.

Congress rejected the House proposal for a sixty-day cooling off period because it was anticipated that it would neither eliminate work stoppages nor reduce tensions associated with labor disputes, and in fact, would have heightened tensions between parties and unnecessarily prolonged the labor dispute. As such, this interference with the "normal" bargaining process was thought to be detrimental to the

¹⁰⁵ 120 CONG. REC. 4590 (daily ed. May 30, 1974).

¹⁰⁶ 45 U.S.C. §§ 151-188 (1970).

¹⁰⁷ Other Representatives were opposed to granting the right to impose an agency shop, or to the grant of the right to strike, even if such right might be qualified by a "cooling-off" period. *See, e.g.*, 120 CONG. REC. 4592 (daily ed. May 30, 1974) (remarks of Rep. Henderson).

¹⁰⁸ 120 CONG. REC. 6397 (daily ed. July 11, 1974) (remarks of Rep. Dellenback).

¹⁰⁹ 120 CONG. REC. 6398 (daily ed. July 11, 1974) (remarks of Rep. Hillis).

parties.¹¹⁰ The legislation, as enacted, eliminated the sixty day cooling off period in favor of preserving the mandatory mediation procedures of the FMCS as a dispute resolution mechanism prior to the impasse stage of the negotiations.

Although it is anticipated that the appointment of an impartial Board of Inquiry will enhance those procedures of the FMCS, it is difficult to perceive how the "normal" bargaining process will continue after such a Board is convened. In addition, the requirement that the Board of Inquiry be convened within thirty days of notice to FMCS if an impasse seems imminent requires that the Director of FMCS be able to predict, far in advance of ultimate resolution, that an impasse will surface and that the dispute will substantially interrupt the delivery of health care services.

The actual conduct and "frame of reference" of the Board of Inquiry, of course, are not dictated by the legislation. While the input of the Board will be developed through practice it was suggested that the Board act with cognizance of the congressional intent of redressing past discrimination against employees in non-profit health care institutions. Consequently, it was recommended that the Board consider (a) a comparison of the annual income of the employees in question and those employed in enterprises of a similar size in the locality, (b) adequate protection for job security and fringe benefits, (c) cost of living increases, (d) career advancement, (e) equal employment opportunity, (f) equal pay, (g) the possibility of grievance resolution without the resort to strikes, and (h) job training and skills.¹¹¹ It is not presently known whether the Board will adopt such a sympathetic view toward the asserted plight of the employees.

The intended impact of the new law is substantial. Senator Taft expressed it as follows:

[T]he health care institution and labor organization will be required to participate in mediation at the direction of the FMCS. Unlike private industry, where mediation is discretionary with the disputants, parties in the health care industry are statutorily obligated to utilize FMCS services. This provision insures the active involvement of the Federal Mediation Service who will attempt, by use of its expertise, to adjust the disputes expeditiously.

The appointment of the board will not interrupt the mandatory mediation process. Mediation will continue while the board performs its critical function. These procedures are intended, and

¹¹⁰ 120 CONG. REC. 12103 (daily ed. July 10, 1974) (remarks of Sen. Williams).

¹¹¹ 120 CONG. REC. 6392 (daily ed. July 11, 1974) (remarks of Rep. Thompson).

should go a long way, to achieve a prompt and peaceful adjustment of the dispute. The new procedures not only provide the parties with more time to reach a settlement, without resorting to strike, but also afford the FMCS a greater and more meaningful opportunity to work with them toward that end.¹¹²

General Counsel Nash has offered the opinion that while the amendment to § 8(d) do not deal expressly with lockouts by employers during initial bargaining situations, § 213 reflects a congressional intent to maintain a status quo, which would preclude strikes or lockouts during the period in which the procedures outlined therein are in operation. Mr. Nash also states:

And even for the ten-day period before the Section 213 Board of Inquiry is established, Congress may well have intended to proscribe not only strikes, but also resort by either party to economic force to change the status quo. In either circumstance, the health care institution may be in derogation of the statutory requirements, and a Section 8(a)(5) complaint may be warranted.¹¹³

It should be noted that the mere proscription of economic pressure during protected periods, or at all, does not provide an absolute guarantee against such activity. (In fact, the hospital strikes in New York and California were undertaken in violation of court orders seeking to prevent or curtail those actions.)¹¹⁴

C. *Bargaining Conduct*

1. *Bargaining Subjects*

To those who decisively strike the balance between rights of employees in the health services industry and the public interest in continuity of health care services in favor of the latter, reliance by the Conference Committee on expressions of intent to encourage voluntary arbitration by labor unions involved in the health care industry must be of little consolation. However, the rejected "cooling off" period, or even compulsory arbitration,¹¹⁵ cannot guarantee that

¹¹² 120 CONG. REC. 12108 (daily ed. July 10, 1974). See also, remarks of Sen. Dominick, *Id.* at 12109.

¹¹³ *N.L.R.B. General Counsel*, *supra* note 30.

¹¹⁴ 120 CONG. REC. 6898 (daily ed. July 11, 1974) (remarks of Rep. Kastenmeier).

¹¹⁵ Some state statutes, most notably Minnesota's, sanction collective bargaining by employees of what would be deemed "health care institutions," but prohibit the labor organization from strikes, providing instead for compulsory arbitration of lingering disputes. It seems clear that such laws will be pre-empted by the federal legislation. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Myers Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). While some discussion during the congressional debates referred to the ability of the NLRB

essential health services will not be jeopardized by unilateral acts, even though unlawful.

The sense of Congress in enacting the amendment was that recognition strikes would be greatly reduced or eliminated by granting employees of health care institutions rights under the National Labor Relations Act.¹¹⁶ If this prophesy proves to be accurate, strike activity in this industry will occur, if at all, when unions flex their collective muscle to effect contract negotiations. The parties are not being asked to assume newly passive roles, however, as it is a common practice to include provisions calling for mandatory arbitration of disputes in the collective bargaining agreements involving health care institutions. It has been estimated that seventy-five percent of the contracts already existing in the health care field so provide, and moreover, that it is generally the employer-hospital that resists such a curtailment of management prerogative.¹¹⁷

There are at least two forms of arbitration currently prevalent in labor relations practice. "Rights" or "grievance" arbitration is used to describe the procedure involving contract interpretation or application. In the second form, "interest" arbitration, the arbitrator is asked to supply the very language and content of the collective bargaining agreement, after the parties reach an impasse in their bargaining procedure. The present position of the NLRB is that "interest" arbitration is not a mandatory subject of bargaining.¹¹⁸

The Conference Committee stated that it recognized the need for the continuity of health services during disputes in this particular industry and pointed to the public declaration by certain labor unions that they would attempt to generate support for the acceptance of arbitration in the event of an impasse in the negotiating process.¹¹⁹

under § 10(a) of the Act to cede jurisdiction to the states, such a hope seems illusory in light of the fact that the Board has not yet deferred to the states under that section. Additionally, Senator Williams specifically cautioned the Board to be circumspect in considering ceding jurisdiction, in the interest of promoting a uniform "national pattern of collective bargaining" in this field. 120 CONG. REC. 12104 (daily ed. July 10, 1974).

¹¹⁶ See, e.g., 120 CONG. REC. 6394 (daily ed. July 11, 1974) (remarks of Rep. Thompson).

¹¹⁷ 120 CONG. REC. 6394 (daily ed. July 11, 1974) (remarks of Rep. Ashbrook).

¹¹⁸ "Mandatory" subjects fall within the generic description of "wages, hours, and other terms and conditions of employment," they must be bargained about in good faith by both sides, and the party proposing the subject may insist, to impasse, that it be included in the ultimate agreement.

¹¹⁹ S. REP. NO. 1175, 93d Cong., 2d Sess. 5 (1974). Four labor unions, National Union of Hospital and Nursing Home Employees, International Brotherhood of Teamsters, Service Employees International Union, and Laborers International Union of North America, filed letters in which they pledged their best efforts to persuade their affiliates to voluntarily avoid work stoppages, through utilization of the arbitration procedures upon the event of an impasse situation in bargaining. Senator Javits was asked if the named four labor organizations were

The Committee stated that under the procedures enunciated in the new legislation, "it is anticipated that, in the event of such impasse, the findings of fact and recommendations of the Board of Inquiry would provide the framework of the arbitrator's decision."¹²⁰ The General Counsel's view is that the language of the Conference Report encourages the use of "interest arbitration" may augur, at least in the health care industry, a re-evaluation of the present tendency to hold that "interest" arbitration is not a mandatory subject of bargaining.¹²¹

The Board has previously given support to the concept that a body of "management rights" or "management prerogatives" exists which often operates to curtail significantly the scope of bargaining and negotiating discussions.¹²² However, this traditional principle has not been without challenge.¹²³

Although it is clear that imposition of the duty to bargain over a particular subject does not completely destroy managerial freedom, as there is no requirement of concession or agreement to the proposal, it is foreseeable that management will often be reluctant to agree to submit unresolved matters of negotiation to an arbitrator. Most employers do not welcome the presence of a union as a "partner" in their business; even fewer, it is suspected, relish the thought that a third party will be called upon to dictate the terms of the collective bargaining agreement that is to impose substantial financial burdens and limitations on the employer's freedom to act in a unilateral manner.

all of the unions that dealt with hospital workers, and the Senator responded that "they are the primary trade unions in the field," and further that any other labor organizations involved would be comparatively small.

¹²⁰ S. REP. NO. 93-1175, 93d Cong., 2d Sess. 5 (1974).

¹²¹ *N.L.R.B. General Counsel*, *supra* note 30.

¹²² The Board, in *General Motors*, 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971), took the view championed by Justice Stewart's concurrence in *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), to the effect that the scope of bargaining under § 8(d) was to be considered in light of management prerogatives. Justice Stewart's earlier opinion stated: "[T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area [of mandatory subjects of bargaining]." *Id.* at 223. The Board was substantiated when the *General Motors* decision was affirmed on appeal. *Local 864, U.A.W. v. NLRB*, 470 F.2d 442 (D.C. Cir. 1972). *See also*, *Summit Tooling*, 195 N.L.R.B. 479, 79 L.R.R.M. 1396 (1972); *contra*, *Johnson's Industrial Caterers*, 197 N.L.R.B. 352, 80 L.R.R.M. 1344 (1972).

The Supreme Court, in a footnote reference in *Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, n.19 (1971) stated:

This is not to say that the application of *Oliver* and *Fibreboard* turns only on the impact of the third-party matter on employee interests. Other considerations, such as the effect on the employer's freedom to conduct his business, may be equally important.

¹²³ *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966).

Although the Committee Reports cited the interest arbitration concept as a factor that would tend to reduce strikes in the health care field, it appears that if an employer is strongly opposed to relinquishing his traditional right to control the terms of the collective bargaining agreement, allowing the union to insist upon the inclusion of the interest arbitration clause to impasse may increase, rather than decrease, the likelihood of strike activity in the health field. The congressional decision was to adopt a system of advisory mediation and fact-finding recommendations, which will result in informed persuasion designed to resolve bargaining conflicts.

Unless experience under the new legislation indicates that strikes of this nature have a substantial effect on patient care, the Board should be reluctant to increase the tensions encountered in the bargaining process by labeling interest arbitration as a mandatory subject of bargaining. Those employers who conclude either that they are especially vulnerable to a strike or that on a policy level, relinquishment of management prerogatives is preferable to jeopardizing patient care will voluntarily accept arbitration. When dealing with a subject which is so crucial to management and union discretion and privilege and which may have the undesired effect of increasing the potential of impasse situations, each party should be free to choose whether to bargain over inclusion of the term or to agree to interest arbitration.

2. Duty to Disclose Information

The concept that an employer has a duty to disclose requested information to a labor organization, as an integral part of the duty to bargain in good faith imposed by § 8(a)(5), has developed primarily in the area of contract negotiations; the union is entitled to proof of assertions made by the employer at the bargaining table.¹²⁴ However, the duty to disclose relevant information lingers beyond the negotiation stage and extends into the period of the ongoing relationship between the employer and the union.¹²⁵

The duty to furnish information during the term of an agreement is drawn from the definition of the term "to bargain collectively", found in § 8(d), which includes "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement, or any question arising thereunder"¹²⁶ The

¹²⁴ *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

¹²⁵ *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

¹²⁶ 29 U.S.C. § 158(d) (1970).

duty has been imposed where grievances are lodged regarding asserted violations of the collective bargaining agreement¹²⁷ and in various other situations that involve the union's attempt to police or administer a contract.¹²⁸ The appropriate charge where the employer refuses to disclose requested relevant information is that of a § 8(a)(5) failure to bargain in good faith.

The General Counsel, assuming that a union does not commit an unfair labor practice by striking or picketing in the absence of ten day notice to the health care institution if the employer is unfairly utilizing that hiatus period to "undermine the bargaining relationship", stated:

[A] union might need information from an employer to accurately gauge the extent of the employer's activities during the ten-day period and thereby to determine whether it is released from its waiting obligation. Since such information might be viewed as necessary for an incumbent union to properly perform its representative duties, the employer would presumably be under an obligation to furnish to the incumbent union such relevant and necessary information bearing on its activities. Failure to do so might constitute a violation of Section 8(a)(5).¹²⁹

The information to be disclosed would bear on the union's ability to distinguish between activities essential to the maintenance of effective health care and those which are designed only to augment the institution's ability to endure the strike.

Present authority indicates that the union has little or no obligation to demonstrate, at the time of the request, that the information sought is relevant.¹³⁰

Any less lenient rule in labor disputes would greatly hamper the bargaining process, for it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issues.¹³¹

¹²⁷ *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). It has also been stated that the grievance procedure is "a part of the continuous collective bargaining process." *United Steelworkers of America v. Warrior and Gulf Co.*, 363 U.S. 574, 581 (1960).

¹²⁸ See, e.g. *NLRB v. F. W. Woolworth Co.*, 352 U.S. 938 (1956); *J. I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958); *Weber Veneer & Plywood Co.*, 161 N.L.R.B. 1054, 63 L.R.R.M. 1395 (1966).

¹²⁹ *N.L.R.B. General Counsel*, *supra* note 30, at 15, 247-48.

¹³⁰ *NLRB v. F. W. Woolworth Co.*, 352 U.S. 938 (1956), *rev'g*, 235 F.2d 319 (9th Cir. 1956); *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964).

¹³¹ *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947, 949 (2d Cir. 1951).

Upon even a cursory analysis of the stated rationale for the accepted duty to disclose information to the union, it is evident that the ten-day notice period imposed by § 8(g) is not the equivalent of the normal bargaining situation. The employer is under no statutory duty to provide the information; in fact, the duty upon which the disclosure requirement is based is not even universally accepted.¹³² More importantly, a liberal rule requiring little or no showing of relevancy is not justified in the notice period situation. Unlike the bargaining process, where it is difficult to determine with any precision what information is relevant until it can be evaluated, the parameters of the inquiry in the notice situation are certain, in that they are confined to ascertaining whether the employer has engaged in acts which undermine the relationship existing between the parties.

As a practical matter, it does not appear that the ten-day notice period will be severely jeopardized by the union's ability to secure information regarding the employer's activities. First, ten days' time passes quickly, especially if an employer has a notion to respond in a sluggish or dilatory manner. Further, an evasive employer can protect the waiting period by providing prompt but vaguely framed responses. Second, an employer who has in fact violated the waiting period is in a secured position so that it is not harmed by providing the information and allowing the union to take immediate responsive action.

Rather, it would appear that the real importance of the information requested from the employer will be to legitimize retroactively strike or picketing activity taken in contravention of the ten-day notice period, regardless of the actual reasons which may have prompted the precipitous action. In addition, the union may seek to know the identity and terms of participation of health care institutions who are to come to the assistance of the noticed employer, in order to attempt to prevent the tender of such aid and thereby pressure the original employer who will be unable to provide satisfactory patient care. Such an abuse is particularly possible if it is determined that the mere threat to picket or strike a health care institution (in this instance, the neutral employer supplying life-preserving services to the noticed employer) is not deemed a violation of § 8(g). Even though it would appear that such activity would amount to unlawful secondary activity, assuming the aiding employer is not termed an

¹³² Although the Committee Reports stated that the employer may not use the ten-day period to undermine the bargaining relationship, Senator Taft's remarks can be read as accepting only the *Mastro Plastics* flagrant unfair labor practice acts as excusing the waiting requirement.

"ally," the knowledge that an employer may be forced to reveal the identity of possible sources of assistance will have a chilling effect on the availability of such assistance, thereby critically jeopardizing patient care.

In light of these potential dangers and the inapplicability of the traditional rationale for not requiring a showing of the relevance of the information sought, it is suggested that the Board demand that the union demonstrate the relevance of the information it requests regarding a possible employer abuse of the waiting period. Moreover, a strict standard of relevance should be applied. For example, a relevant consideration is whether an employer has made plans to replace employees and, if so, which particular employees and skills are to be replaced. However, the identity of the source of the replacements (*e.g.*, which lending health care institution) is not relevant to the question of whether such replacements have the effect of undermining the bargaining relationship. Additionally, a good faith requirement should be imposed on such requests, to guard against the possible danger of abusive or harrasing use of the privilege to request information.

Given the protection of a requirement of relevance and good faith, the employer should have no legitimate objection to providing the data sought by the union. Such disclosure would also be consistent with the legislative concern for protecting the continuity of health care, for if the employer informs the union of the legitimacy of its actions, unwarranted disregard of the waiting period should be prevented. The forced exchange of information may also have the subsidiary effect of increasing effective communication between the parties, perhaps leading to a resolution of the strike-threatening dispute.

V. ACCOMMODATION OF RELIGIOUS BELIEFS

The legislation, as finally enacted, contains an exemption from compulsory membership in or support of a labor organization for those employees who decline such in response to legitimate religious convictions.¹³³ An employee who, due to his religious teaching or

¹³³ Section 19 provides:

Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment, except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code, chosen by such employee from a list

belief, is given the opportunity to avoid financial support for membership in a labor organization without the fear of discharge from his employment, must nonetheless make a financial sacrifice equal to that of his unionized counterparts by contributing an equivalent amount of money to a qualified "nonreligious charitable fund."

This exemption arises from the recognition that certain religious organizations oppose the concept of unionization and that their applicable religious dogma precludes membership in labor organizations. Significantly, the impact of organized religion in the health services field is substantial.¹³⁴ Moreover, religious beliefs are generally accommodated throughout the legislative framework, in accordance with the demands of the First Amendment.

Senator Ervin presented an amendment which would have provided that the new legislation removing the previous exemption would not apply to "any corporation or other association operating a hospital, if that hospital is owned, supported, controlled or managed by a particular religion or by a particular religious corporation or association." That is, *all* employees of religiously owned or operated hospitals would be completely exempted from coverage. The amendment was rejected.

The chief concern in this area appears to be for the Seventh Day Adventists, who operate numerous non-profit hospitals in nineteen

of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.

It should be noted that any employer violates § 8(a)(3) of the Act by refusing to allow an employee to discharge obligations arising under union security agreements by tendering dues and initiation fees, but without formally joining the union. A union cannot compel an employer to discharge an employee, and an employer may not acquiesce in such action, except for instances where the employee fails to pay required dues or fees. *Hershey Foods Corp.*, 207 N.L.R.B. No. 141, 85 L.R.R.M. 1004 (1973). As used in § 8(a)(3), "membership" represents only a financial obligation, which is limited to the payment of fees and dues. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). Additionally, an employee may not be discharged for his failure to sign a dues checkoff authorization, as long as there is a valid tender of the dues. *American Screw Co.*, 122 N.L.R.B. No. 74, 43 L.R.R.M. 1153 (1958). Presumably, rights established by § 19 of the Act are in addition to these general principles.

¹³⁴ At least one third of all non-profit hospitals have some religious affiliations. 120 CONG. REC. 6453 (daily ed. May 2, 1974) (remarks of Sen. Javits).

Sen. Cranston pointed out that such hospitals no longer need to rely on their own resources and the "charitable instincts of the community," as the government has been willing to commit "significant resources" in the form of subsidies and grants to these institutions. He stated:

As for their respective employment relationships, each hospital must compete for the same labor market since religiously affiliated hospitals no longer depend on recruiting exclusively from members of their religious order or persuasion. Because of their markedly similar operating and administrative structure, both religious and nonreligiously affiliated hospitals draw upon the existing manpower pool to fill their ranks.

120 CONG. REC. 6952 (daily ed. May 2, 1974).

states and the District of Columbia.¹³⁵ This particular church teaches its members not to belong to or contribute support to a labor organization. The amendment protects the *employee* whose religion dictates against union membership or support; it does not effectively relieve the religiously-affiliated employer of related theoretical confrontations. Thus the more narrow exemption recognized in the enacted law does not vitiate the dilemma faced by the church in deciding whether to recognize a union in one of their hospitals or whether to bargain with the union, once certified. It does relieve the member-employee from the uncomfortable situation in which he would have to ignore the teachings of his religion in order to retain his employment.¹³⁶

Clauses similar to the language of the statute are not unknown in existing collective bargaining agreements. The AFL-CIO Executive Council, for example, has urged its affiliates to "adopt procedures for respecting sincere personal religious convictions as to union membership or activities."¹³⁷ Consequently, clauses have been accepted in collective bargaining agreements which provide that fees and dues may be paid to non-religious charities. Such clauses often are less restrictive than the amendment, allowing individual conscience and religious beliefs to control, rather than being restricted to membership in a religious sect that has "historically" held such objections. Naturally, such provisions may still be negotiated by the parties, although the explicit language of the statute may restrict the parties' willingness to broaden the exemption provided.

Reliance on the enacted language, rather than the collective bargaining capacities of the parties, necessitates enforcement and policing by the third-party government agency, instead of the immediate

¹³⁵ The Seventh Day Adventists operate approximately forty-six hospitals in the country, comprising less than one percent of the hospital bed capacity in the United States. 120 CONG. REC. 6953 (daily ed. May 2, 1974). The Catholic Hospital Association, comprised of over 850 hospitals (with approximately 160,000 beds, 360,000 employees, and over forty-five million patient days of care in 1972) adopted an official policy that would recognize the right of hospital employees to form or join a union, and recommended that their member hospitals recognize this employee right. 120 CONG. REC. 5964 (daily ed. May 2, 1974).

¹³⁶ The exemption may also provide relief to the employer caught between the Scylla of a union security clause and the Charybdis of an employee with protected religious beliefs. In the recent decision *General Color & Chemical Co., Inc. and International Brotherhood of Pottery & Allied Workers*, 2 C.C.H. Empl. Prac. Guide 5260 (1974), the Ohio Civil Rights Commission found that an employer practiced unlawful religious discrimination where it discharged an employee who refused, on religious grounds, to comply with the union security clause, and where the employer made no attempt to accommodate the employee's religious beliefs. The labor union involved was also found to have engaged in unlawful religious discrimination when it demanded discharge of the employee without attempting the required accommodation.

¹³⁷ 120 CONG. REC. 7287 (daily ed. May 7, 1974).

parties to the employment relationship. While the Senate elected not to include language that would also exempt employees with conscientious objections "based on religious training and beliefs in relation to a supreme being involving duties superior to those arising from any human relation,"¹³⁸ even a cursory reading of the enacted exemption provides a premonition of the ongoing dispute-resolution role of the NLRB. Particularly agonizing interpretations must give flesh and sinew to the skeletal frame provided.

The statutory language fails to articulate standards to govern the application of the various imprecise concepts stated in the law. The initial findings that the employer is a member, and that he actually adheres to teachings of, a "bona fide religion" will be required. Such a fact finding process will presumably be necessary either where the exemption is actually claimed, or upon filing of unfair labor practices by the employee whose claim has been rejected, or whose employment has been terminated. Meaning must be given to the term "historically held conscientious objections."¹³⁹ The burden of proof that the employee does, in fact, possess such beliefs, as well as for other issues associated with the exemption, will fall to the employee.¹⁴⁰

It should also be recognized that the legislation does not unilaterally impose a union on such employees: the fact remains that a majority of the employees of any health care institution must vote to accept the union representative.

VI. APPROPRIATE BARGAINING UNITS

Section 9 of the Act gives the Board the power to determine the appropriate unit for bargaining, by providing that the collective bargaining agent selected by a majority of the employees "in a unit appropriate for such purposes" shall be the exclusive representative of all of the employees in the designated unit.¹⁴¹

As the strategic predictions of employee sympathies often influence pre-election actions of both the employer and the union, the size

¹³⁸ 120 CONG. REC. 7287 (daily ed. May 7, 1974) (amendment proposed by Sen. Dominick).

The General Counsel has affirmed the view that a valid union security obligation may be enforced where the employee's refusal to join the union is based on individual beliefs rather than a reliance on any "historically held conscientious objections" of the religion. The amendment's exception regarding union security agreements, being of a limited nature, was determined to be unavailable where there was no showing that Roman Catholicism is a religion which has such historically held objections to joining or financially supporting labor organizations. *General Counsel Monthly Report on Health Care Institution Cases*, Second Report, Section IV, 88 L.R.R. 105 (1975).

¹⁴⁰ 120 CONG. REC. 7291 (daily ed. May 7, 1974) (remarks of Sen. Dominick).

¹⁴¹ 29 U.S.C. § 159.

and composition of the unit is not uncommonly a point of differing proposals and disputes between the parties. Under the Act, the Board is given the authority (and the courts have granted wide discretionary latitude to the Board),¹⁴² to make determinations regarding appropriate employee groupings. In exercising its discretion in this area, the Board considers and balances various factors.

One of the most important of these factors is embodied in the "community of interests" concept. Under this doctrine, the Board will attempt to combine those employees who share "substantial mutual interests in wages, hours and other conditions of employment."¹⁴³ Considerations within this generic description include the method by which wage scales are determined, benefits enjoyed, number of working hours, method of supervision, requisite qualifications and skills of the employees, actual job functions, work responsibilities away from the employer's premises, degree of interaction with other employees, and the bargaining history of the employees.¹⁴⁴ Other factors in the determination of an appropriate unit include the history of bargaining of the group of employees under consideration,¹⁴⁵ desires of the employees,¹⁴⁶ the nature and organizational structure of the employer's business,¹⁴⁷ statutory considerations,¹⁴⁸ and the interest of the public.¹⁴⁹

¹⁴² The Board's decision will generally not be modified unless it is shown to be arbitrary or capricious. *May Dep't. Stores Co. v. N.L.R.B.*, 326 U.S. 276 (1945). Section 9(b) also imposes specific statutory limitations on the Board's ability to exercise an entirely unfettered discretion. Pursuant to this section the Board may not (a) combine professional and non-professional employees in the same unit (unless the professional employees evince such a desire); (b) find a unit to be inappropriate due to a past determination; or (c) include guards and other employees in the same unit.

¹⁴³ Fifteenth Annual Report of the NLRB, 39 (1950).

¹⁴⁴ *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134 49 L.R.R.M. 1715 (1962).

¹⁴⁵ *See, e.g., Buckeye Village Market, Inc.*, 175 N.L.R.B. 46, 70 L.R.R.M. 1529 (1969). Obviously, the length of the bargaining history is an important element to be considered. For example, the Board has held that a fourteen month history of craft bargaining did not exclusively establish a pattern of bargaining. *Phelps Dodge Corp.*, 98 N.L.R.B. 726, 29 L.R.R.M. 1405 (1952).

¹⁴⁶ This factor will be of heightened importance where there are other indications that two or more units are appropriate. This element was given the imprimatur of Supreme Court approval in *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1940).

¹⁴⁷ Where independent units possess a substantial amount of autonomy, reflecting separate interests of the employees, the Board will fragment the employer's work force. *See NLRB v. Kostel Corp.*, 440 F.2d 341 (7th Cir. 1971) and *Jackson Manor Nursing Home*, 194 N.L.R.B. 152, 79 L.R.R.M. 1166 (1972).

¹⁴⁸ *See note 134 supra.*

¹⁴⁹ In *NLRB v. Delaware-New Jersey Ferry Co.*, 128 F.2d 130 (3rd Cir. 1942), the Court would not enforce a Board determination that grouped both deckhands and ship officers working for a ferry company in the same unit. In language that could be applicable to the health care institution situation, the Court stated:

The scope of the unit is often the focal point of disagreement between the employer and the union, because in many instances it is a significant factor in the determination of the union's majority status or its ability to present the requisite thirty per cent showing of interest to compel an election. Therefore, the union will often seek to petition for the largest possible unit where it is anticipated that it has a good prospect of winning an election. Conversely, the likelihood of losing the broader-based election will dictate that the unit sought will be small. In the alternative, the employer may seek to shape or mold the projected bargaining unit, dependent upon its foreseeable strengths or weaknesses in the proposed grouping. However, it is suspected that conclusions as to the appropriate unit are often premised only on immediate election strategy. The ongoing ability of the institution to manage and administer a labor contract within a large unit or to cope with the frequency of bargaining and diverse nature of many small units must be considered in this regard.

Experience has shown that in the usual circumstance, the health service employer often seeks an all-employee unit,¹⁵⁰ while the union will attempt to fragment the employees into smaller groupings classified along general skill or job function considerations. A prevalent pattern in hospital situations is for the union to segregate five distinct units: registered nurses, licensed practical nurses, technical employees, clerical employees, and service and maintenance employees (including nurses aides and orderlies).¹⁵¹

[T]he point here is not what the officers want, nor what the men want, nor what the company either wants or is willing to acquiesce in, but rather, what is the public interest. The Board's duty to serve the public interest cannot be affected by the desires or acquiescence of the parties.

Senator Taft stated that "there is a definite need for the Board to examine the public interest in determining appropriate bargaining units" in the health care institution, citing *Delaware-New Jersey Ferry Co.* for support of this proposition. 120 CONG. REC. 7311 (daily ed. May 7, 1974).

¹⁵⁰ The employer's desire that the unit be large may be an election strategy premised on the suspicion that the varying socio-economic patterns and associations of the wide range of employees in a health care institution may compel rejection of a union on a visceral identification level. For example, while licensed practical nurses and technically-skilled employees may emotionally spurn membership in unions which traditionally represent the blue collar worker (e.g., the Laborers' or Teamsters' unions), their less skilled counterparts may identify with such groups, to the exclusion of other interested unions.

In *North Dade Hospital*, 210 N.L.R.B. No. 82, 86 L.R.R.M. 1261 (1974), the employer sought a unit including almost all employees asserting that all of their efforts were directed toward treatment of patients, that they worked in close proximity, and that they enjoyed identical fringe benefits. In *Madeira Nursing Center*, 203 N.L.R.B. No. 42, 83 L.R.R.M. 1033 (1973), the union sought a unit composed of all employees except registered nurses and licensed practical nurses. The employer argued that these employees should not be excluded.

¹⁵¹ See testimony of Retail, Wholesale and Department Store Workers' Union, as discussed in *Madeira Nursing Center*, *supra* note 142.

The typical health care institution employer will contend that an overall unit is appropriate, as the principal function of all the employees is directly related to providing the wide spectrum of patient care, including emergency, diagnostic, medical, surgical and other related services. Reinforcement for the overall unit argument is supplied by the legislative directive that fragmentation into smaller units should be denied, due to the increased possibility of life-endangering strikes if not for other considerations.

The union's response is frequently that the requested smaller unit is not only a distinct and homogeneous unit, but one which provides services which can be segregated from, and which are merely supportive of, the institution's principal service of direct patient care. The ultimate decision, of course, will depend upon the particular facts of each case.¹⁵²

The recent metamorphosis of the law does not create any specific provision for definition of appropriate units in the hospital situation. Both Committee Reports state that "due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry."¹⁵³ Senator Dominick, in his personal view appended to the Senate Committee on Labor and Public Welfare Report, emphasized that the bill did not adequately recognize the need for special treatment of the hospital industry and reaffirmed that a proliferation of bargaining units can pose a "serious threat to uninterrupted health care."¹⁵⁴

¹⁵² The Board and the courts will often find units of less than all of the employees to be appropriate. *See, e.g.,* St. Joseph's Infirmary, 194 N.L.R.B. 495, 86 L.R.R.M. 1261 (1974) (unit of dietary, maintenance, laundry and housekeeping employees found appropriate despite employer's claim that only an overall unit was appropriate); Syosset General Hospital, 190 N.L.R.B. 304, 77 L.R.R.M. 1121 (1971) (separate unit for technicians and clerical employees found appropriate); Labor Relations Comm. v. University Hosp., Inc., 269 N.E.2d 682, 77 L.R.R.M. 2374 (1971) (skilled tradesman of maintenance department of hospital found to be appropriate unit).

The propriety of including the administrative or office-clerical departments in the bargaining unit will depend on the employee's classification on the payroll, the nature of the job performed, the portion of the work day spent in the office setting, other employees with whom the employee comes in contact, interchange of duties and functions (and if so, with whom), and a comparison of hours worked and pay scales. *See, e.g.,* New Fairview Hall Convalescent Home, 206 N.L.R.B. No. 108, 85 L.R.R.M. 1227 (1973). (records clerk, emergency room clerks status in appropriate unit discerned, where Board investigated nature of clerical functions, involvement with employees concerned with treatment of patients, time spent in patient care area, and relationship of services performed to care and treatment of patients); *St. Joseph's Infirmary, supra*, (dispatch service department employees and mailroom and distribution center employees included in overall unit); *Jackson Manor Nursing Home, supra* note 139 (receptionist, admissions employees, clerks and bookkeepers excluded from unit due to classification as office clericals).

¹⁵³ S. REP. No. 766, 93d Cong., 2d Sess. 5 (1974).

¹⁵⁴ S. REP. No. 766, 93d Cong., 2d Sess. 45 (1974) (individual views of Sen. Dominick),

The fear of the potential effect of sanctioning a great number of units in the health care situation was expressed during the congressional debates. Senator Taft remarked that hospitals and similar health care institutions

are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided patients. If each professional interest and job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care.¹⁵⁵

Senator Taft introduced a provision which would have placed a statutory limit of four bargaining units in a health care institution. The language was rejected, but the result was the admonition in the Committee Reports that explicitly instructs the Board to attempt to limit the number of bargaining units present in these instances.

Senator Williams admitted that the Committees clearly intended that the Board should be cognizant of the potential dangers lurking where many units exist in the health care institution, but he expressed the view that the Board has traditionally exercised good judgment in establishing units, especially in the situation of a newly-covered industry. Senator Williams stated:

While the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among non-supervisory employees, particularly where there is such a history in the area or a notable disparity of interests between employees in different job classifications.¹⁵⁶

Although some support for the proposition that the various skills and interests in the health care institution should be represented in different bargaining units may be drawn from the congressional rejection of a statutory limit on the possible number of units, the clear indication of the Committee Reports and legislative history is that while the Board is left to exercise its informed discretion in the decision, the nature of the health care industry warrants a special attempt to limit the number of bargaining units established.

The Committee Reports specifically approved of Board decisions in *Four Seasons Nursing Center*¹⁵⁷ and *Woodland Park Hospital*.¹⁵⁸ In *Four Season*, an election petition was presented

He would favor specific statutory language to minimize the number of bargaining units.

¹⁵⁵ 120 CONG. REC. 6940 (daily ed. May 2, 1974).

¹⁵⁶ 120 CONG. REC. 1210 (daily ed. July 10, 1974).

¹⁵⁷ 208 N.L.R.B. No. 50, 85 L.R.R.M. 1093 (1974).

¹⁵⁸ 205 N.L.R.B. No. 144, 84 L.R.R.M. 1075 (1973).

wherein the union sought to represent two employees in the maintenance department (there were approximately 140 other employees). It was declared that the maintenance employees were not a distinct and homogeneous group with interests separate from those of the other employees, and that the duties performed did not require a high degree of skill or training that would justify finding a distinct unit.

Similarly, in *Woodland Park Hospital*, the union took the position that an all-employee unit was inappropriate and urged that three separate units be declared (all clericals, all technical employees, and all other employees). The Regional Director found that employees in the proposed units did not possess sufficiently separate and distinguishable interests to warrant finding the three units appropriate. The Board concluded that a finding of a separate unit of X-ray technicians in this instance would lead to "severe fragmentation" of units in the health care industry. In doing so, the Board overruled a previous ruling that found a unit of "radiological technologists" appropriate, despite the claim that the unit should encompass employees in other technical classifications.¹⁵⁹

While the Committee Reports also expressed approval for the trend toward broad units enunciated in the *Extendicare of West Virginia* decision,¹⁶⁰ the particular holding in that decision was "not necessarily" adopted. In *Extendicare*, the petitioning union sought to represent three separate units: licensed practical nurses, technical employees, and service and maintenance employees. The employer contended that only an all-employee unit would be appropriate and sought to add some clerical employees excluded by the union. The Board found that the licensed practical nurses had a community of interests distinct from the other employees, and that they therefore constituted an appropriate separate unit. However, the Board continued to find that, in light of the separate LPN unit and the minimum number of technical employees involved, the technical employees and the service and maintenance employees constituted a single appropriate unit. Presaging the hesitation expressed in the Committee Reports, Member Kennedy dissented on the ground that he considered the over-all unit sought by the employer to be appropriate.¹⁶¹ He was aware of no precedent that would countenance splitting a comprehensive unit into segments where there is only one union involved and where no prior history of collective bargaining exists.

¹⁵⁹ *Ochsner Clinic*, 192 N.L.R.B. 1059, 78 L.R.R.M. 1038 (1971).

¹⁶⁰ 203 N.L.R.B. No. 170, 83 L.R.R.M. 1242 (1973).

¹⁶¹ The all-employee unit, excepting office clericals and standard exclusions (supervisors, professionals, guards, etc.) was found to be an appropriate unit in *Butte Medical Properties (Medical Center Hospital)*, *supra* note 11.

The fear of unit fragmentation has special importance in the health care industry, given the wide range of employee classifications and skill levels which exists and the various labor organizations that seek to represent those diverse workers.¹⁶² Units are determined by imprecise phrases such as "distinct and separate interests" and "distinct and homogeneous group." These standards encourage forensic duels over factual criteria, and the asserted requisite quantum of shared interests (or lack thereof) has a tendency to vary as the vagaries of election strategy dictate.

Thus, it would be prudent to interpret the new legislation as favoring a limited number of bargaining units. The necessary flexibility to determine appropriate units must repose in the NLRB, but the mandate to make those determinations with regard to the congressionally approved precedents should often tip the balance in the favor of broadened units. Unwarranted unit fragmentation is the harbinger of frequent jurisdictional disputes and consequent work disruptions. The cost and administrative complications of coping with various unions and obligations, in light of the public nature of the industry, must also be considered. Moreover, "leap frogging" and "whipsawing" of employers by different trade unions, which occurs, for example, in the construction industry, must not be permitted to jeopardize the public interest inherent in continued health care.¹⁶³

¹⁶² For example, the Ohio Hospital Association testified before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare that there are at least twenty ". . . different professional and technical groups which have indicated an interest in representing their members in collective bargaining in hospitals. In addition, craft unions . . . could be expected to seek representation rights for hospital employees performing craft-related work, as well as unions representing employees in specific types of hospital-related industries,"

Due to the fact that the vast majority of the nation's more than 1.5 million workers employed in private hospitals are presently unorganized, it is unquestioned that many unions will attempt to attract new members among that group. For example, the July 29, 1974, *Wall Street Journal* reports that officials of the Service Employees International Union, which already represents 200,000 health-care workers, speak of an expansion in this area that would possibly double its size within the next few years.

Major organizing efforts are expected from a multitude of existing unions, ostensibly unrelated to health care employees, such as the Laborers International Union, the American Federation of State, County and Municipal Employees, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The Retail, Wholesale and Department Store Union already has an existing affiliation with the National Union of Hospital and Health-Care Employees, and the Retail Clerks International Association has spawned a division to organize not only rank-and-file hospital personnel but also doctors, nurses, pharmacists, lab technicians, and licensed practical nurses. In the first election under the new law, the Firemen and Oilers Union won the right to represent forty supply and distribution workers at a Kansas City Hospital. *Wall Street Journal*, October 8, 1974, at 1, col. 5.

¹⁶³ See the remarks of Sen. Taft in 120 CONG. REC. 6941 (daily ed. May 2, 1974).

VII. SPECIAL STATUS OF HEALTH CARE INSTITUTIONS

A. *Continuity of Health Services*

The unique and vital service provided by health care institutions merits special consideration to insure its uninterrupted availability.¹⁶⁴ Although some commentators were not alarmed by the potential of work stoppages in the health industry,¹⁶⁵ the prevailing view was that the essential nature of health care functions required efforts designed to minimize the likelihood of disrupted patient services.¹⁶⁶ The Committee Reports reflected this concern by stating that Congress expected that the Board would give "special attention and priority" to unfair labor practice charges in the health care situation, "consistent with existing statutory priority requirements for particular classes of cases."¹⁶⁷

The Committees noted the existence of priority case treatment by the Board under § 10(1) of the Act, involving charges filed under §§ 8(b)(4) (secondary picketing), 8(b)(7) (recognitional picketing) and 8(e) ("hot cargo" agreements), as well as other existing priority directives under § 10(m).¹⁶⁸ Additionally, the Committees enunciated the policy that appropriate investigatory and related resources be developed to insure the requisite priority to health care institution problems or disruptions.

The General Counsel promptly reacted to the congressional suggestion, and announced the following priority schedule:

¹⁶⁴ The Ohio Hospital Association, in its appearance before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, warned that extension of jurisdiction to the hospital employer may have a drastic detrimental effect on the public, in that a hospital may be faced with situations where it cannot provide "uninterrupted care to its patients." The Association, not unnaturally, places the public's right to health care above the right of employers to regulate union activity and the right of employees to engage in concerted activity. Testimony of the Ohio Hospital Association, *Hearings on S794 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess., Aug. 2, 1973.

¹⁶⁵ See, e.g., the remarks of Rep. Thompson, at 120 CONG. REC. 4588 (daily ed. May 30, 1974), where he expressed the view that the unions involved in the hospital industry are "extraordinarily responsible" and have "invariably" not engaged in strike activity unless adequate care for patients was guaranteed. He concluded: "So there is really nothing but an illusory danger that the medical support needed by so many citizens would be deprived . . ."

¹⁶⁶ For example, Senator Dominick did not deem the issue as frivolous as Representative Thompson did, and in his personal view appended to the Senate Report, S. REP. NO. 93-766, 93d Cong., 2d Sess. 39 (1974), the Senator quoted at length newspaper articles pointing out the need to provide speedy solutions to impasses between labor and management in the health care industry.

¹⁶⁷ S. REP. NO. 766, 93d Cong., 2d Sess. 6 (1974); H. R. REP. 1051, 93d Cong., 2d Sess. 8 (1974).

¹⁶⁸ *Id.*

1. Initial consideration must be given to statutory priorities found in Sections 10(1) and 10(m) of the Act. Therefore, nonhealth care charges arising under the provisions outlined in those sections will receive attention before non-priority cases involving the health care industry.
2. As between non-health care and health care cases, both of which involve charges warranting priority under Sections 10(1) or 10(m), the health care charge is to receive priority.
3. As between non-health care and health care cases, neither of which involve charges warranting priority under Sections 10(1) and 10(m), the health care cases will be handled first.¹⁶⁹

B. *Solicitation and Distribution Rules of Health Care Institutions*

In an effort to provide a degree of certainty and stability in the arena of organizational activities, the NLRB has developed a set of presumptions concerning the appropriateness of employer rules about solicitation of union membership and distribution of union literature. They are based on the nature of the activity (distribution of literature or solicitation), whether the activists are employees or outside union organizers, the time and place of the activity in question, and whether the activity interferes with production, plant discipline, or cleanliness. The recognition of the special status of health care institutions may lead to the creation of modified standards for these institutions.

For example, in recognition that some employment situations present unique circumstances, employers in certain industries have been permitted to impose more stringent no-solicitation and distribution rules than would be deemed permissible in more normal cases. Broad no-solicitation and/or distribution rules have been justified by the need to keep the premises "clean and orderly or the need to maintain discipline";¹⁷⁰ to maintain production and discipline within the plant;¹⁷¹ to prevent accidents;¹⁷² to prevent the creation of a hostile atmosphere incompatible with good working conditions;¹⁷³ for purposes of good housekeeping, safety, and fire prevention;¹⁷⁴ and to

¹⁶⁹ *N.L.R.B. General Counsel*, *supra* note 30, Senator Taft had proposed language for the amendments which would have dealt statutorily with the question of priority handling. The proposal was dropped because the Senate Committee was of the opinion that the existing statutory language was sufficient. Senator Taft was confident that the Board would act "with the greatest expedition" in health care cases, especially in consideration of the fact that delay may cost human lives. 120 CONG. REC. 6941 (daily ed. May 2, 1974).

¹⁷⁰ *United Steelworkers v. NLRB*, 243 F.2d 593 (D.C. Cir. 1956), *rev'd on other grounds*, 357 U.S. 357 (1958).

¹⁷¹ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

¹⁷² *F. P. Adams Co.*, 166 N.L.R.B. 967, 65 L.R.R.M. 1695 (1967).

¹⁷³ *Stuart F. Cooper Co.*, 136 N.L.R.B. 142, 49 L.R.R.M. 1729 (1962).

¹⁷⁴ *Korn Industries, Inc. v. NLRB*, 389 F.2d 117 (4th Cir. 1967).

avoid detrimental effects on the employer's business resulting from organizational efforts.¹⁷⁵ The rules imposed by the employer must be designed and intended not to limit significantly employee rights but, rather, to provide protection for legitimate employer interests.

The necessary approach to questions of broad no-solicitation rules is to examine the discussed presumptions and rebuttals, based on the facts of the individual cases. An employer may prohibit solicitation during working time (as opposed, perhaps, to "working hours"),¹⁷⁶ but prohibitions extending to periods outside working time (before or after work, meal or break times, etc.) will be presumed to be an unreasonable impediment or restraint on employee rights of self-organization guaranteed by § 7 of the Act. In this latter instance, the burden falls to the employer to rebut the presumption of invalidity with evidence that "special circumstances" make the broad rule necessary. Conversely, if a presumptively valid rule is promulgated (for example, on that limits solicitation during employees' work time), this presumption can be rebutted by a showing that the rule was adopted for a discriminatory purpose, whereupon the employer must then prove that the rule, although discriminatory, was nonetheless necessary to maintain production or discipline.¹⁷⁷

The Board and the courts are not timid in striking down management activity which is calculated to undermine a union's attempt to achieve an electoral majority among the employees. Special scrutiny is deemed necessary in order to counterbalance the power inherent in the employer's position vis-a-vis his employees so that the exercise of organizational rights guaranteed to employees is not inhibited or prevented. Therefore, unjustified broad prohibitions, or those of uncertain dimensions, being naturally abusive of employee rights, are readily struck down.¹⁷⁸

¹⁷⁵ Marshall Field & Co., 98 N.L.R.B. 88, 29 L.R.R.M. 1305 (1952), *modified*, 200 F.2d 375 (7th Cir. 1952).

¹⁷⁶ If a rule can reasonably be interpreted to preclude solicitation activities during break times, lunch periods, and other times where the employee is not actually working, the Board has frequently held it to be invalid. The term "working hours," "company time," and other ambiguous descriptions may be considered so imprecise as to preclude enforcement, because the clear effect of a broad ambiguous rule is to inhibit organizational efforts. *NLRB v. WKRG-TV, Inc.*, 470 F.2d 1302 (5th Cir. 1973); *Swisher & Son, Inc.*, 211 N.L.R.B. No. 114, 87 L.R.R.M. 1123 (1974); *Ohio Masonic Home*, 205 N.L.R.B. No. 65, 83 L.R.R.M. 1665 (1973); *Cedar Corp. (West Side Manor Nursing Home)*, 203 N.L.R.B. No. 33, 83 L.R.R.M. 1159 (1973). See also the discussion at note 175, *infra*.

¹⁷⁷ *Heritage House*, 192 N.L.R.B. 1081, 78 L.R.R.M. 1114 (1971).

¹⁷⁸ The broadest statement of the need to protect employee rights appears in the Board decision in *Daylin, Inc.*, 198 N.L.R.B. No. 40, 81 L.R.R.M. 1145 (1972), where an employer's rule prohibited all solicitations on the premises during paid working hours. The majority (Members Fanning, Jenkins and Penello) stated that the Act protected the rights of employees

In considering application of the "special circumstances" doctrine to the health care situation, the Board and the courts are not in agreement. The courts, exhibiting the same tendency they have in the retail store situation, are more prone to accept broad employer prohibitions on solicitation and distributions than is the Board.

The Board has taken the position, in *Summit Nursing and Convalescent Home*,¹⁷⁹ that although a broad restriction may be lawful where extraordinary circumstances are shown, no special needs that would justify a limitation on the self-organization rights of employees are present in the convalescent home situation.¹⁸⁰

In *Summit Nursing*, the employer's rule read:

In order to give our undivided attention to the job of caring for our patients, no employee shall engage in solicitation for any cause or distribute literature of any kind during an employee's working time at any place in the home. No employee should engage in solicitation or distribution of literature at any time in the patient or public area within the home, or in the nurses' stations. No employee shall distribute literature for any cause in working areas of the home, at any time.

The Board found that the rule did not meet the rules enunciated in *Stoddard-Quirk*¹⁸¹ for the valid prohibition of the distribution of literature, because the rule could be interpreted to cover activities during non-working time. Finding the rule ambiguous in this respect, the Board held (in line with the weight of precedent)¹⁸² that the risk of the ambiguity must be borne by the employer as the framer of the rule.¹⁸³ The Board held that the rule was presumptively invalid and

to solicit, even during working time, as long as there is no resulting interference with production. Any prohibition of solicitation must be justified by an affirmative showing of an impairment of production.

Member Kennedy dissented, being of the opinion that an employer can lawfully insist that "working time is for work" and that employees may be disciplined for neglecting their work to engage in solicitation activities. Without evidence to suggest that the rule was enforced to prohibit solicitation in non-work time or non-work (non-selling) areas, Member Kennedy would find no § 8(a)(1) violation. (Chairman Miller also dissented).

¹⁷⁹ *Summit Nursing and Convalescent Home*, 196 N.L.R.B. 769, 80 L.R.R.M. 1069 (1972).

¹⁸⁰ See also, the Board decision in *Monterey Life Systems Bellaire Gen. Hosp.*, 203 N.L.R.B. No. 151, 83 L.R.R.M. 1291 (1973), dealing with solicitation in hospitals.

¹⁸¹ *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962).

¹⁸² See, e.g., *Miller Charles & Co.*, 148 N.L.R.B. 1579, 57 L.R.R.M. 1211 (1964), *enfd*, 341 F.2d 870 (1956) (2d Cir. 1965), and *Avon Convalescent Center*, 200 N.L.R.B. 99, 82 L.R.R.M., 1233 (1972), and cases cited in note 168 *supra*.

¹⁸³ Some question regarding the effect of the ambiguity encountered in *Summit Nursing Home* exists as a result of the recent Board decision in *Essex International, Inc.*, 211 N.L.R.B. No. 112, 86 L.R.R.M. 1411 (1974), where the employer had prohibited solicitation during

that no special justifications warranted a broad no-solicitation rule, as the prohibited activities did not endanger the health and welfare of the patients, create a litter problem,¹⁸⁴ or interfere with the operation of the home.

The United States Court of Appeals for the Sixth Circuit found the employer's rule to be reasonable and, in denying enforcement of the Board order, adopted the rulings of the Trial Examiner.¹⁸⁵ The Trial Examiner had held that the rule was intended to prohibit solicitation in all public areas within the home, including the lobbies and the patients' dining rooms. The ruling affirmed by the Court was that any possible presumptions of invalidity were overcome by the nature of the operations of the home and the special conditions involved. Because a large percentage of the patients were in advanced stages of senility, requiring constant care and attention, activities diverting the attention of the employees (the union organizing campaign) would interfere with the proper performance of employee duties.

The holding adopted by the Court, then, was that a broad solicitation and distribution prohibition was reasonable. It was justified by the special nature of employee activities required for the care of patients in a convalescent home and the possible prejudice to the

"work time" and distributions "in work areas or during work time." In the "majority" opinion, Chairman Miller (consistent with his previous dissents in this regard) and Member Kennedy found a clear distinction between the terms "working hours," the time interval between reporting for work and the end of the shift, and "working time," the time spent actually performing job functions (thereby excluding break times, eating periods, etc.). A rule prohibiting solicitation during "working hours" would be presumptively invalid, they opined, while the prohibition during "working time" would be presumed valid, as it would "clearly convey" that employees would be free to engage in the activities in question during those time that they were not actually working.

The ruling was facilitated by evidence showing that the understanding of the employees was consonant with this interpretation, as solicitation had actually occurred during lunchtimes and breaks. Members Fanning and Jenkins dissented, on the ground that the rule was too ambiguous to convey effectively the lesser restraint, and that it was therefore invalid.

This decision would appear to overrule previous Board rulings construing these terms and holding restrictions applied to "working time" invalid. However, one of these previous contrary rulings was in the *Avon Convalescent* case, roughly four months prior to the *Essex* decision, where the Board decision was affirmed in the Sixth Circuit Court of Appeals, in whose jurisdiction the *Essex International, Inc.* plant is located. The *Essex* construction of the term "working time" was subsequently upheld in *General Motors Corp.*, 211 N.L.R.B. No. 123, 87 L.R.R.M. 1167 (1974).

¹⁸⁴ In addition to the right to prohibit distribution of literature in non-working areas during working time, and working areas at all times, *Stoddard-Quirk Mfg. Co.*, *supra* note 173, an employer may prohibit distribution performed "in such a manner so as to litter the plant." *Litton Industries*, 192 N.L.R.B. 793, 78 L.R.R.M. 1041 (1971), *enforced*, 465 F.2d 104 (3d Cir. 1972); *Genessee Merchants Bank and Trust Co.*, 206 N.L.R.B. No. 74, 84 L.R.R.M. 1237 (1973).

¹⁸⁵ *NLRB v. Summit Nursing Home*, 472 F.2d 1380 (6th Cir. 1973).

health and welfare of these patients, caused by the solicitation and distribution efforts of employees and union organizers.¹⁸⁶

For some time after the *Summit Nursing and Convalescent Home* decision, the Board consistently struck down broad no-solicitation rules at health care institutions.¹⁸⁷ However, in *Guyan Valley Hospital*,¹⁸⁸ the Board adopted the findings of the Trial Examiner, who upheld a rule prohibiting solicitation in hospital working areas. The Trial Examiner extended the "working area" of the hospital to those areas necessarily open to the use of patients and their visitors and allowed the rule to encompass those locations because patients and visitors might reasonably be upset by employee arguments regarding union matters.

The question that must be squarely confronted is the justifiable extent of the no-solicitation rule in the health care institution: may such an employer forbid solicitation, at any time, in those sections of the premises occupied and frequented by patients and the public? Framed more expansively, what are "non-work" areas for purposes of distribution of literature,¹⁸⁹ and will the "special circumstances"

¹⁸⁶ The ruling that special application to the efforts involved in union organizational campaigns as evidenced by the rejected Board order, which the Board justified by the fact that previous solicitations had been permitted to collect funds for gifts for departing employees or for employees to display commercial sales articles.

¹⁸⁷ In *Cedar Corp. (West Side Manor Nursing Home, supra, note 168)*, the Board found no "valid basis" for excepting the case at hand from the presumptive illegality of prohibiting solicitation during non-working time, "particularly in non-working areas," and it treated union solicitation was no different from other forms of solicitation (citing the Board decision in *Summit Nursing and Convalescent Home*). In this instance, an employee distributed union cards and leaflets on the public sidewalk outside of the home on her off-duty hours. The employer argued that the solicitations in the home and on the public sidewalks were properly prohibited at all times because they would tend to have a disturbing impact on the psychiatric patients of the home. Based on evidence regarding the normal activities and outside exposure of the patients, the Board rejected this argument.

In *Extendicare of Kentucky, Inc. (St. Joseph's Infirmary, supra note 144)*, the Board found, without comment, that a rule which prohibited solicitation or distribution on the premises of the hospital was invalid, as it was thought to be broad enough to interdict solicitation by employees on the premises during non-work time and distribution of literature by employees during non-work time in non-work areas.

¹⁸⁸ *Guyan Valley Hospital*, 198 N.L.R.B. No. 28, 81 L.R.R.M. 1023 (1972). The Board attempted to distinguish the *Summit Nursing Home* decision on the facts that the rule in that instance had been adopted in response to a union campaign, where as in *Guyan Valley Hospital* it was adopted beforehand and, further, that the hospital rule prohibited solicitation only in the hospital's "working area" (rather than all "patient or public" areas).

¹⁸⁹ The General Counsel has determined that a § 8(a)(1) complaint was warranted where an employer banned the distribution of literature anywhere on hospital premises, and more specifically prohibited the distribution of literature at the hospital main entrance and on a private sidewalk bordering an ambulance emergency runway. The ban on such distribution was deemed to be presumptively unlawful because it was not limited to work areas. *General Counsel Monthly Report on Health Care Institution Cases*, Third Report, Section II, 88 L.R.R. 180 (1975).

encountered in the health care situation justify a prohibition of solicitation broader than only restricting employees' activities on "working time"?

It is submitted that the "special circumstances" doctrine should justify, in the admittedly unique health care situation, broad no-solicitation and distribution rules by employers. Present authority sanctions prohibition of solicitation in sales situations, as well as in situations where the activity would interfere with employee job performance.

An employer has no obligation to pay employees for time spent in organizational activities on behalf of a union, absent a contractually incurred responsibility in that regard.¹⁹⁰ This is especially true where the activity will affect and interfere with the customers (patients) that the employer serves. As soliciting for a union presumptively interferes with the work responsibilities of either the solicitor or the person solicited, when one or both have assigned duties to attend to,¹⁹¹ a rule that prohibits solicitation in working areas during working hours of the health care institution should be deemed presumptively valid. This contention is supported by consideration of the duties performed by the majority of hospital employees, which involve proximity, availability, and frequent interaction with patients and visitors.

A health care institution is not a manufacturing or industrial concern. Just as the circumstances in which retail sales occur are deemed unique,¹⁹² it should be recognized that many areas of the health care institution are open to the public and the patients and that

The General Counsel also issued a similar complaint in the instance where the no-distribution rule did not apply to "employee only" areas, but which prohibited distribution, among other places, in the hospital cafeteria and coffee shop. The § 8(a)(1) complaint was based on the facts that the only areas reserved only for employees in the hospital were small locker room lounges (which were used by only a small minority of employees), while the vast majority of the patrons of the cafeteria and coffee shop were employees on non-work status. The General Counsel noted that no work was performed in the cafeteria and coffee shop, and that these areas were used almost exclusively by the employees. Reasoning that these areas were analogous to an employee dining room, which was found to be a non-work area in *Guyan Valley Hospital, Inc.*, 198 N.L.R.B. No. 28, 81 L.R.R.M. 1023 (1972), the General Counsel approved the complaint for the purpose of placing the issue before the Board. In the General Counsel's view, the mere fact that an area is open to visitors and patients does not justify a ban on distribution, without a further showing that distribution would be a source of danger to the health of patients at the facility. *General Counsel Monthly Report, Id.* Based on the rationale behind the "special circumstances" doctrine as it was developed in the retail store situation, the requirement that danger to uninvolved third parties be demonstrated appears subject to challenge.

¹⁹⁰ *NLRB v. Daylin, Inc.*, 469 F.2d 484 (6th Cir. 1974).

¹⁹¹ *TRW, Inc. v. NLRB*, 393 F.2d 771 (5th Cir. 1968); *NLRB v. Essex Wire Corp.*, 245 F.2d 589 (9th Cir. 1957).

¹⁹² *May Department Stores*, 59 N.L.R.B. 976, 15 L.R.R.M. 173 (1944).

these areas should be designated "working areas" where solicitation may be forbidden during all operating hours of the institution. The employer has legitimate concerns that patients and visitors maintain confidence in the professional competence of the staff and the institution, that the employees who are charged with the responsibility of providing the various aspects of patient care not be distracted or interrupted while discharging their duties, and that the public and patients not be burdened with involvement in arguments and discussions related to the desirability of union representation. As indicated in the *Guyan Valley* decision, the nature of the institution and the necessity of patient protection should overcome any presumptions of invalidity of the broad prohibition. Absent a showing of unavailability of non-public, non-patient areas in the institution and extreme difficulty in reaching employees apart from the institution premises, a broad no-solicitation rule should be enforced. While the organizational rights of employees cannot be unduly restricted, the unique demands of the health care situation, involving the presence of unrelated third parties (the public), justify establishment of a different standard for these employers. A health care institution has a right to expect, and further to insist, that its patients and the public be insulated from union-management dialogues and activities that are not related to health care. The interaction and co-mingling of patients, visitors, and employees justifies the broad rule. Principles designed to accommodate rights of employees who are isolated from the public, as in the normal manufacturing setting, cannot be arbitrarily engrafted onto the health care institution situation.

VIII. CONCLUSION

Sponsors of the new legislation expanding coverage of the National Labor Relations Act to envelop "health care institutions" insist that the new law will reduce the number of strikes, which are thought to occur primarily for the object of recognition of the labor organization, in that industry. In addition, they claim that impending threats of employee walkouts will be substantially vitiated by the mandatory mediation provisions of the amendments. The new legislation appears to be a functional approach designed to allow employers and employees to share in the fruits of collective bargaining while recognizing the vagaries of the health care situation and the realities of the critical need of enduring patient care.

In addition to the salutary novel provisions of the legislation, the new law will have a significant impact on existing law. The Board and the courts will be summoned to regulate the competing interests of labor and management, tempered by the public interest in uninter-

rupted health care. The amendments explicitly recognize the unique and distinct nature of the health care industry and, in so doing, have charged the NLRB and the courts with the continuing responsibility to protect and enforce the paramount public interest in unhindered access to effective health care. The legislation is more than a mere attempt to delineate the relative rights of employer and employee in the health care institution; it is a mandate that the public interest remain undiluted and pre-eminent when these three interests must be balanced.